The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 19 May 2015

Session 4

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JUSTICE COMMITTEE
16th 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:

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab)
The Rt Hon Lord Gill
John Lamont (Ettrick, Roxburgh and Berwickshire) (Con)
Sheriff Gordon Liddle (Sheriffs Association)
Tom Marshall (Society of Solicitor Advocates)
Eric McQueen (Scottish Courts and Tribunals Service)
Sheriff Nikola Stewart (Sheriffs Association)
James Wolffe QC (Faculty of Advocates)

CLERK TO THE COMMITTEE

Tracey White

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 19 May 2015

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the Justice Committee's 16th meeting in 2015. I ask everyone to switch off mobile phones and other electronic devices, as they interfere with broadcasting even when they are switched to silent. No apologies have been received. I welcome Patricia Ferguson. John Lamont will attend later as Margaret Mitchell's substitute for consideration of witnesses for the Apologies (Scotland) Bill, when we shall have our revenge, at last, on Margaret Mitchell.

Margaret Mitchell (Central Scotland) (Con): Nice to see you so unbiased, convener.

The Convener: There you are—a declaration of interest. [*Laughter*.]

Agenda item 1 is a decision on taking business in private. The committee is invited to agree to consider in private item 4, which is consideration of a call for written evidence on the Community Justice (Scotland) Bill, and item 5, which is consideration of witnesses for the Apologies (Scotland) Bill. Is that agreed?

Members *indicated agreement.*

Petition

Fatalities (Investigations) (PE1567)

10:00

The Convener: Agenda item 2 concerns petition PE1567. The Public Petitions Committee last week referred the petition to this committee for consideration in the context of our scrutiny of the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill.

The petition, by Donna O'Halloran, calls on the Scottish Parliament to urge the Scottish Government to change the law and procedures in relation to the investigation of unascertained deaths, suicides and fatal accidents in Scotland. Are members content to consider the petition as part of our scrutiny of the bill and to keep it open?

Members *indicated agreement.*

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

10:01

The Convener: Agenda item 3 is our third evidence session on the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill at stage 1. We will hear from three panels of witnesses today.

I suspend the meeting briefly to allow the members of the first panel to take their places.

10:01

Meeting suspended.

10:01

On resuming—

The Convener: Before I welcome the panel, I ask Roderick Campbell to declare an interest.

Roderick Campbell (North East Fife) (SNP): Thank you, convener. I refer to my interest as a member of the Faculty of Advocates.

The Convener: I welcome to the meeting James Wolffe QC, dean of the Faculty of Advocates, and Tom Marshall, president of the Society of Solicitor Advocates. Thank you both for your written submissions. We will go straight to questions from committee members.

Margaret Mitchell: Good morning, gentlemen. I would like to look at the issue of delays. You will be aware that, to tackle the issue, Lord Cullen recommended that an early hearing be held within three months. The hearing would set out where the Crown Office and Procurator Fiscal Service were and how imminently a fatal accident inquiry would be heard. Do you have any views on the matter?

James Wolffe QC (Faculty of Advocates): I begin by saying that we very much welcome the bill, which modernises the system for inquiries into fatal accidents and sudden deaths.

By way of a preliminary comment, it is worth observing that FAIs vary enormously in their nature and complexity. At one end of the range are mandatory inquiries into situations such as deaths in custody, where there is no real complexity. The inquiry will convene and deal with the evidence very quickly, and the sheriff will be able to make a determination on an entirely uncontroversial basis—the matter may be dealt with within part of a day.

At the other end of the range are extremely complex inquiries, such as two that I have conducted. One was the Rosepark inquiry, which I conducted for the Crown. I was led to believe that it was the longest FAI that had been held—I hope that it was not cause and effect—but it was a very long, complex and difficult inquiry for a variety of reasons. The other was the Declan Hainey inquiry, which followed on from a prosecution.

There is such a range and diversity of circumstances and such complexity in the subject matter and nature of an inquiry that it is very difficult to be prescriptive about timescales for starting an inquiry. There is also the need, where a criminal prosecution is in prospect or under consideration, to allow the criminal process to be dealt with by way of priority. While we all favour expedition in inquiries, I suggest that being overly prescriptive is not necessary or helpful.

Margaret Mitchell: The idea of an early hearing is not to say that the fatal accident inquiry should be held within a certain timescale, although other witnesses may recommend that; the idea is that it is merely to inform the relatives, within three months, of the state of play. It is to concentrate the minds of the Crown Office and Procurator Fiscal Service, to ask what point the investigation has reached, and to make sure that the investigation does not disappear or get put on to the back burner and that there are no unnecessary delays.

As I understand it, the hearing does not have to be a very formal occasion—it can be in chambers—but it keeps the relatives involved. Are you in favour of an early hearing on those terms?

James Wolffe: I can see that there could be merit in a process in which the Crown is required to keep people informed. The question in my mind is whether the Crown is doing that anyway. There would be concern if the Crown were not keeping those most intimately concerned apprised of where it was and, if there was to be a significant delay to the start of an inquiry, why that was the case.

Tom Marshall (Society of Solicitor Advocates): I agree in principle with the idea of an early hearing. I read Lord Cullen's evidence to the committee with great interest. It seems to me that having an early hearing does not leave the matter entirely within the hands of the Crown Office and Procurator Fiscal Service. It brings the court into play at an early stage and, therefore, it gives the court an element of control of the pace at which matters happen in future. That must be important.

Parliament has recently legislated on court reform, and one of the principles that lay behind Lord Gill's recommendations was that litigants should not be allowed to litigate at their own pace. It seems to me that that principle could equally apply to fatal accident inquiries. Giving the court the power at the start to keep an eye on things and make sure that matters are moving forward is extremely important.

Margaret Mitchell: I would add to that another suggestion from Lord Cullen: that the Crown Office and Procurator Fiscal Service should be properly resourced—that in effect a fatal accident inquiry unit should be created. He then said, however, that such a unit, to be located in the deaths unit, was almost there already. The key point was that it should be properly resourced to ensure that resourcing was not a factor in any unnecessary delays.

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

Margaret Mitchell: That is helpful. We have not heard that aspect before, which is interesting.

The Convener: Do you wish to comment on that, Mr Wolffe?

James Wolffe: It is plainly essential that the COPFS is appropriately resourced to be able to handle its responsibilities.

Margaret Mitchell: An issue that follows on from what you have just said, Mr Marshall, is whether the reasonableness test should still apply in relation to legal aid. It seems that the matter has been ruled out of the bill, primarily on financial grounds, but the point was made about Crown Office and Procurator Fiscal Service representation.

Tom Marshall: In my opinion, it is important that families are represented. In some workplace accident cases, there may be support from a trade union, but in other circumstances financial backing may not be available. My own experience of last year's Super Puma helicopter inquiry was that the families wanted to bring forward a number of different issues that did not seem to be on the procurator fiscal's agenda. Without the support of the trade union movement, those issues might not have been aired at all—that is an important point. With reference to what Lord Cullen said to the committee a fortnight ago, it seems to me that he has hit exactly the right note.

The Convener: I will let other members in on that point. Does Rod Campbell have a supplementary question?

Roderick Campbell: It is on a different point.

The Convener: I will just put you on my list. I call Elaine Murray.

Elaine Murray (Dumfriesshire) (Lab): The bill puts into practice many, but not all, of Lord Cullen's recommendations. I particularly want to ask for the witnesses' views on his recommendation that there should be mandatory FAIs for people who die while in the care of the state, such as children in care or people detained under mental health legislation. I also ask for views on whether the bill meets our human rights obligations.

James Wolffe: We have expressed the view that the scope of the mandatory inquiry requirement should be expanded to cover the category of children who are not in secure accommodation but who are in residential establishments listed in the Children (Scotland) Act 1995 and the Social Work (Scotland) Act 1968. I read with some interest the submission from the Equality and Human Rights Commission, and it strikes me that the issue is one that the Government should think about again.

There are two elements to consider, one of which is the requirement on the state. Whether it is a death in custody or a death of someone who is in the care of the state, there is at least the potential for human rights obligations to kick in through a series of procedural requirements, including a requirement for public scrutiny. Without wanting to commit myself to the stark proposition that the bill does not comply with our human rights obligations, I would say that there is a need for the Government to look carefully at categories of cases and to consider whether the mandatory provision is drawn broadly enough.

Lest there be concern that to expand the scope of the mandatory inquiry is to put pressure on the inquiries system, I reiterate my earlier point that, in an inquiry where the facts are straightforward and uncontroversial, what one is securing by having an inquiry is an element of public scrutiny, through the sheriff, of what the COPFS has done by way of its own inquiries, but that such an inquiry need not take up large amounts of court time.

The Convener: Perhaps it would just establish that it was not controversial, but that is also important.

James Wolffe: Indeed. That in itself may be important.

Tom Marshall: I have nothing to add to that. I agree.

Elaine Murray: My colleague, Patricia Ferguson, has proposed her own member's bill—

The Convener: Is this still on the same point?

Elaine Murray: Yes, it is on mandatory FAIs.

The Convener: Okay. Other members have supplementary questions, but we will come to them later. Please carry on.

Elaine Murray: Patricia Ferguson proposes to extend mandatory FAIs to deaths caused by industrial diseases or exposure to hazardous substances. Have you a view on that?

10:15

Tom Marshall: As someone who practises daily in the area of industrial disease, my personal view is that there would be value in having inquiries in certain circumstances. Although, particularly in the case of asbestos, the events that gave rise to the illness and death will have happened many years ago, a considerable number of cases are still coming forward that involve organisations that are still in existence, such as public bodies or former nationalised industries.

The working practices that gave rise to the recent development of an asbestos-related disease may still be going on. They may not be still affecting the individual who has developed the disease, but they may affect others who currently work in the same environment. There may be some value in holding an inquiry from time to time, perhaps in slightly unusual circumstances, where the mere fact of having an inquiry would promote better working practices among those who are dealing with dangerous substances.

James Wolffe: I wonder whether the matter is adequately dealt with by the provision for discretionary inquiries. It is implicit in what Mr Marshall said that, from time to time, an inquiry may be justified in the case of death through industrial disease. I do not for a moment dissent, but I suggest that such cases be dealt with through the opportunity to hold discretionary inquiries, which, under the bill, is fortified by the requirement for the Lord Advocate, on request, to give reasons if he chooses not to have an inquiry in a particular case.

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

The Convener: Section 8 is on "Reasons for decision not to hold an inquiry". Obviously,

someone has to request that the reasons be provided in writing. Should the bill perhaps make provision for someone to challenge the reasons why the Crown is not to hold an inquiry once those reasons have been provided in writing? I do not think that there is any such provision in the bill.

Tom Marshall: There is precedent for that without the need for any provision. A judicial review—

The Convener: But that is a cumbersome procedure, is it not?

Tom Marshall: Essentially, that would be the means by which—

The Convener: Should there be something in the bill that might be more potent and efficacious?

James Wolffe: I will pick up on Tom Marshall's point about the current position, which is that if the Crown refuses to have an FAI, a judicial review can be brought. The requirement to give reasons will enable the justification given by the Crown to be scrutinised by the court in a judicial review. The grounds of review are limited: one would have to be able to show that the Crown had gone wrong in its understanding of the law, or that some other aspect of the decision made it unreasonable in a technical sense.

The cases that have been brought have tended to focus on whether the Crown has adequately reflected article 2 of the European convention on human rights in the decision not to hold an FAI. One can scrutinise the circumstances and, if the Crown has decided not to hold an FAI when article 2 requires it to do so, the court can intervene.

Ultimately, whether one wants more intrusive scrutiny of the reasoning given by the Crown is a matter of policy. The parameters of a judicial review depend on showing that the Crown has acted unlawfully or, in the technical sense, unreasonably. The question is whether there ought to be some sort of appeal process in which somebody independent reviews the Crown's decision. I do not have a view one way or the other on that. I am inclined to think that it would add a potential layer of complexity, but I do not have a particular view to advance.

Tom Marshall: I wonder whether this could fit in with the early-hearing proposal. If the court was seized of matters at an earlier stage, and subsequently a decision was taken by the Lord Advocate that the inquiry should not proceed further, the court would already have the matter in front of it and would be in a position to oversee the decision not to hold an inquiry in those circumstances. Do you follow me?

The Convener: I follow you; I am just thinking about the word "oversee". Where does that take us? Would the court be in a position to overrule the decision? That would be different, would it not?

Tom Marshall: That would be the direction.

The Convener: It is worth exploring, anyway, rather than staying with the status quo. That was what I was wondering about: I understand the word "oversee", but it is possible to oversee and then not do anything, although you meant that the court would oversee and then do something.

I want to stay with mandatory FAIs and the issue of what should be mandatory for this spell of questioning.

Jayne Baxter (Mid Scotland and Fife) (Lab): Good morning. We heard evidence on 5 May 2015 about people who were subject to mental health detention and who committed suicide. If an FAI is to be a means by which lessons are learned in order to prevent or minimise the risk of recurrence, do you think that FAIs should be mandatory when people who are subject to mental health detention commit suicide?

Tom Marshall: Would the point not be that it should be mandatory for there to be an inquiry into the death of anyone who is in mental health detention? My view is that the law should err in favour of having mandatory inquiries, with the option to opt out at the discretion of the Lord Advocate, rather than having discretionary inquiries that have to be opted into. The mental health situation is one such where, in my opinion, that is the way the law should go.

Jayne Baxter: I would agree.

The Convener: That is nice to know. [*Laughter*.] Mr Wolffe, do you wish to comment?

James Wolffe: As I said earlier, having read the evidence of the Equality and Human Rights Commission I think that there is an issue in precisely the kind of situation that you are describing, and that needs to be looked at again by the Government.

The Convener: Is your question on mandatory FAIs, Mr Campbell?

Roderick Campbell: It follows on from Jayne Baxter's point. At paragraphs 116 and 117 of the policy memorandum, the Government refers to the graduated scale of investigations into mental health deaths from the Royal College of Psychiatrists. The witnesses may have seen that in the policy memorandum and I also raised the matter last week. Do you have any general comments about that as an alternative?

Tom Marshall: I read that note in the policy memorandum and I also read the evidence that was given by the mental health witnesses last week. However, for the reasons already given, I

still favour the view that it is better to have an opt-out than an opt-in.

The Convener: Ms Baxter agrees, so you are all right there. [*Laughter*.] Do you wish to comment on that, Mr Wolffe?

James Wolffe: My only point is that if the facts are uncontroversial, the inquiry process will be relatively short and formal but it will fulfil an important public function—public exposure of what has happened.

The Convener: It seems to continue the thread of the principle that for the death of anyone who is in the mandatory custody of the state, whether it is by statute or by order of the court—in prison or residential care, or under some kind of mental welfare legislation—there should be at least an opt-out of an FAI, rather than an opt-in. Is that where we are going?

James Wolffe: Yes.

Tom Marshall: Yes.

Gil Paterson (Clydebank and Milngavie) (SNP): My question relates to industrial disease. If it were compulsory to hold an FAI in cases of industrial disease, how many would there be? If it were discretionary to have an FAI in such cases, how many FAIs would there be likely to be? What sort of cost are we talking about?

One of the forever-running campaigns relates to compensation for sufferers and victims of asbestos-related disease. If we went down the line of having an automatic FAI, would that impact on them or is it a separate issue?

Tom Marshall: First, the inquiry procedure does not have anything to do with compensation, other than that it may allow evidence to be brought out that could be useful for other purposes, such as a claim for compensation or a prosecution. The number of mesothelioma deaths in Scotland is now more than 200 a year. There are also cases of lung cancer, which may or may not be related to asbestos exposure. There are potentially many hundreds of those cases. However, even if there were a mandatory requirement to hold an inquiry, there is still the option to opt out.

It may be that, for the reasons that have already been explored this morning and in previous evidence sessions, it is unrealistic to have a mandatory inquiry in every case of industrial disease, and that the better course for such cases would be to take the opt-in approach, picking those cases where there is some new issue that it would be worth exploring for wider reasons of health and safety, which would have lessons that would resonate in industry today, rather than just establishing the facts of what happened in the past.

Gil Paterson: I was aware that an inquiry would not lead to compensation, but I am thinking of the system itself. If more inquiries were held automatically when there may not be a need—as we already know what the cause is and it is probably on the person's medical record—it would add cost to the system. There are finite amounts of money and pressure might be felt further down the line. Some people believe that compensation should bear the costs. We know what the cause is and we know that people are carrying it, but in some people's minds that is the pinchpoint.

Tom Marshall: I know that members have been looking at recovering the cost of healthcare for industrial disease sufferers, which is a potentially controversial area. I am not sure that I can add a great deal more.

There is no doubt that there is cost in holding an inquiry, and the question must be whether that expenditure is worth while in looking forward as much as looking back. An inquiry is about looking forward in order to prevent the same circumstances from happening again as far as possible, allowing people to learn lessons and adopt different practices. If it can be seen that an inquiry into events that are long in the past would still have lessons for us today and for the future, that would be money well spent.

Christian Allard (North East Scotland) (SNP): I have a couple of points on deaths abroad. Section 6 says that an inquiry could be held when

"the person's body has been brought to Scotland."

There could be exceptional circumstances around a death abroad that mean that it is not possible, for one reason or another, to have the body recovered and sent back to Scotland. Should the bill reflect that?

10:30

James Wolffe: I confess that that is not an issue that I have thought about. I do not have an immediate view to express.

Tom Marshall: I am not sure that I have got anything very useful to add on that subject either.

The Convener: I think that the committee wonders why it is necessary to bring back a body. There will be circumstances in which it is impossible to do that but there might still be an FAI. Rather than asking you to chew the matter over now, we ask you to write to us once you have reflected on it.

Christian Allard: It would be good if you could.

My other point is on what the Faculty of Advocates wrote in its submission about the location of an inquiry. You have expressed the view that it maybe should be stated in the bill that

the inquiry should take place locally. However, paragraph 43 of the explanatory notes, on section 12, says:

"indeed it is expected that the majority of FAIs will be held in the same sheriffdom as the place of death."

I do not understand. What kind of amendment would you like to see to the bill? Is there really a need for the amendment that you suggest? Is it more the spirit of such an amendment?

James Wolffe: Yes. The particular point that has been raised is that one of the reasons why it is a good idea for inquiries to be held locally is the accessibility of the inquiry to those who are most intimately affected, particularly the family of the deceased but also witnesses who may have to travel to give evidence to the inquiry. There are of course circumstances in which the death occurs at a location that is not where the deceased lived and not where the family is, so the first of those is not always a compelling factor. We recognise that it is a good thing to put flexibility into the system to allow inquiries to be held at the appropriate place, which may not always be the local sheriffdom. Our particular concern is that the decision-making process should take into account the interests and views of the family in particular. It may be that that could be built in by way of an amendment.

I notice, for example, that, under section 12, where the sheriff makes an order transferring the proceedings to a sheriff of another sheriffdom, he has to give

"participants in the inquiry an opportunity to make representations".

The family will not always be participants in the inquiry, and one could add in a requirement that the family be given the opportunity to make representations. Equally, where the Lord Advocate, under section 12(2), is choosing the sheriffdom in which proceedings are to be held, there could be a requirement on him to take into account the wishes and interests of the family. I am not suggesting that those can always be determinative, because there may be a range of factors, but at least an obligation to take those interests into account could be added to the bill.

Christian Allard: That answers the question regarding the families but it does not address another issue. Should the sheriff principal have a greater role in the decision about the location? Should the sheriff principal defend their own location?

James Wolffe: As I read the provisions in section 12, the Lord Advocate chooses the sheriffdom, but the sheriff may also make an order transferring proceedings. Sorry, I may have said "sheriff principal" in error, but I see that it says the sheriff. That is my mistake.

Christian Allard: I am just thinking that the sheriff principal might be seen as being excluded from the process.

Tom Marshall: One way of dealing with that would simply be to say in the interpretation section, section 38, that "sheriff" includes "sheriff principal". In practical terms, the sheriff principal would be involved, because he is managing the business in the sheriffdom.

Christian Allard: In other words, it might not need to be added. I take the point that was made with regard to sections 12 and 6.

The Convener: The issue of the early hearing that was raised by Margaret Mitchell might sit alongside the issue of families and relatives being consulted. It might be appropriate for the matter to be heard in a different sheriffdom, but families should know why.

Roderick Campbell: When Lord Cullen gave evidence on 5 May, he said:

"an FAI is there for the purpose of inquisition, not for the purpose of establishing rights, duties and obligations."—[*Official Report, Justice Committee*, 5 May 2015; c 6.]

In that context, would you have concerns about sheriffs' recommendations being binding? How should we approach sheriffs' recommendations?

James Wolffe: Our view is that sheriffs' recommendations should not be binding. We take that view for a number of reasons. The first is that, ultimately, if there is a recommendation to change a public authority's system or a particular policy or approach of a private employer, the authority for making policies to ensure that the authority or the employer has an appropriate system of work falls on the public authority or the employer. Although one would expect any responsible public authority or private body to take seriously recommendations from a sheriff following a fatal accident inquiry, there might be considerations that, quite properly, had not been brought within the ambit of the particular circumstances of the death, but which are taken into account when deciding what is the right thing to do. For that reason, which is one of principle, it would be wrong to make the recommendations binding.

Making the recommendations binding would also have a material impact on the nature of the inquiry process, because the stakes will be all the higher for those who might be affected by recommendations and who might not, indeed, be participants of the inquiry, as other bodies might be involved. That could lead to the inquiry process becoming more difficult, protracted and adversarial, because if the recommendation is going to be binding, it matters to those who will be affected by it that all the issues within the confines of the inquiry are dealt with.

Tom Marshall: The issue is a conundrum, and one that is difficult to answer. On the one hand, you have a public judicial inquiry—witnesses may be compelled to attend; they give evidence under oath; submissions are made on behalf of interested parties; and the sheriff makes a detailed and reasoned determination. Should that disappear in a puff of smoke at the end of that process? Clearly, that is a major concern. On the other hand, however, I have some sympathy with what James Wolffe has said. It is difficult to say that making recommendations binding will not alter the nature of the inquiry process. One of the values of the inquiry process is that it ought to be an open process in which people should not be taking sides, because the object is to get the facts into the open and to bring as much information to light as possible, so that lessons can be learned. However, the question is how you ensure that the lessons that have been learned are acted on.

Roderick Campbell: That brings me to my next question. If we accept your point for the moment, how do we improve the response to such recommendations and ensure that proper regard is had to them? Has the bill got it right?

Tom Marshall: I agree that people to whom recommendations are directed should respond and that those responses should be publicised. In fact, that is the very least that should happen. If the response is put on record, people will be able to see whether it is likely that the recommendations will be acted on. There might be an impact for victims of a subsequent event if recommendations have been made, responses of one sort or another to those recommendations have been given and there is a repeat of the same event in future, but I think that the difficulty lies in formally binding people to do certain things.

James Wolffe: Another way in which making the recommendations binding would affect the process is that sheriffs might become much more cautious about the recommendations that they make. What might seem sensible in the light of the tragic circumstances of an individual case might not be appropriate to implement for very proper reasons when things are looked at in a broader context.

For that reason, it seems to me that the bill has struck the appropriate balance because, as I understand it, those to whom recommendations are directed will be expected to respond to them. I expect that, if someone decides not to implement a recommendation, they will wish to explain why, and the requirement in and of itself to consider a response ought to have an impact on those to whom recommendations are directed. There is perhaps a question whether the procedure for publication through the Scottish Courts and Tribunals Service is exactly the right way to go about that, but the broad thrust of the policy in the bill seems to strike the right balance.

Roderick Campbell: Is there an alternative to using the Scottish Courts and Tribunals Service?

James Wolffe: I suspect that that might be the problem. I suppose that it could be done through the Scottish Government itself. I do not have a particular answer to your question, but I recognise that an issue has been raised about giving that body the responsibility for publishing these matters.

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

The Convener: Accepting your point that making recommendations enforceable would completely or significantly change the nature of an FAI, I nevertheless find it somewhat unsatisfactory that when such recommendations are made, someone has to reply in writing or tell the Scottish Courts and Tribunals Service why they are not fully complying with them—and that is it. Could the bill contain a provision under which if the process as set out had been gone through and the Scottish Courts and Tribunals Service was not satisfied with the response from the party or parties involved, it could make something enforceable or undertake a further process?

I understand that there could be further criminal or civil proceedings, and there would be pressure to have those, but simply to publicise the recommendation is not enough. I understand that a recommendation from an FAI could not be made enforceable in all cases, for the various reasons that we have heard. Is there not some way, however, in which to ensure that there is more push for compliance, even in part, within section 27, when the Scottish Courts and Tribunals Service is not happy about things?

10:45

James Wolffe: The problem would then be who would do that in the Scottish Courts and Tribunals Service. Is it envisaged that it would go back before a sheriff who would have some monitoring role over the way in which a recommendation is implemented or not implemented? If it is to be a sheriff who has that role, what sanction is to be applied other than the sanction of public opinion or

the pressure that comes from being forced at least to confront the recommendation and make a response to it?

One should not lose sight of the fact that what a judicial inquiry is very good at is making determinations about what has happened—what caused the death, what failings there have been in systems of work and the like. The question of what needs to be done in order to put things right is much broader. It is not a simple question of working out what the facts are and applying the law to the facts. It is an exercise of deciding what a policy response should be, if we are talking about a public authority, or how a private enterprise ought to change its systems. That is almost a quasi-legislative role, particularly if we are talking about public authorities.

Sheriffs in our current system are free to, and do, make recommendations about changes that they think emerge from the facts of the case. At the end of the day, however, it has to be for the body concerned to consider the issue at large and to decide for itself what its responsibilities are.

Tom Marshall: Could I suggest that one option would be to require a response to the recommendation to go back to the sheriff rather than to the Scottish Courts and Tribunals Service, and for the inquiry proceedings themselves not to close until a response to the recommendation had been received?

The Convener: That is helpful. At the moment, people must wonder, when a recommendation is made, whether that is it. I understand the reasons that you have given, but families and the public do not understand why a recommendation cannot be tougher.

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab): Good morning, gentlemen. On that point, at the moment sheriffs can clearly make recommendations and there have been occasions when sheriffs have made recommendations that, if they had been followed, would have prevented future incidents. By "incidents", we are necessarily talking here about the loss of life. In the circumstance in which a sheriff chooses to make a recommendation, and feels strongly enough that that recommendation would in all probability prevent future fatalities or casualties, should there not be a mechanism whereby that sheriff can say so and have a sanction that they can apply if that recommendation is not carried out?

Tom Marshall: As you were talking, I was thinking of the case of Louise Taggart's brother, which she movingly discussed at the meeting on 5 May. One can see that, if some step that could have been taken to protect electricians in the work that they were doing had been publicised, further lives would not have been lost. I do not know enough about the details, but I suspect that the electricians who lost their lives after Louise Taggart's brother lost his were not all employed by the same people and therefore the recommendation, had there been one at an earlier fatal accident inquiry, would have had to be acted upon not only by Mr Adamson's employers, but by the employers of the other men who subsequently lost their lives. Had those men still lost their lives, notwithstanding a recommendation, then the sanction would surely be for the Crown to prosecute those who had failed to take the appropriate measures to protect those other men, rather than for there to be some follow-up from the fatal accident inquiry that had been held into the death of Mr Adamson. One would be introducing a new breed of sanction almost, the limits of which would be ill-defined.

As I indicated, it is a conundrum, but that imperfect situation may be the best that can be achieved.

Patricia Ferguson: I understand that the reason for an FAI, or the circumstances of the case that leads to an FAI, may vary; however, that was just one example. Another example to which I can refer you is the case of the Newton and Bellgrove train crashes, both of which were caused by drivers passing signals that told them not to pass. At the first of those fatal accident inquiries, the sheriff clearly said that if there were to be a system of double blocking—in other words, if two signals would have to be passed before such a danger would be encountered—that would be a good thing to come out of that inquiry. That recommendation was ignored, and a few years later the same thing happened again.

It seems to me that there is not much point in a fatal accident inquiry being held if all that it does is find out what happened and no lessons are learned from it. I suggest that a sheriff being able to make a recommendation when he or she feels that that is appropriate should be considered at this stage.

Tom Marshall: I agree entirely that finding the correct solution—one that works in law—is the difficulty.

James Wolffe: I agree entirely that one of the purposes of an inquiry is to learn lessons. If there is a failure to follow a recommendation by the person to whom that recommendation is directed, and further lives are lost, as Tom Marshall said earlier, that may be relevant in the context of subsequent decisions on whether to prosecute or in questions of civil liability. It may not be entirely without sanction.

Patricia Ferguson: I accept that that is the case in law, but in practical terms, should we not

be trying to prevent further loss of life, rather than prosecuting people when it happens?

Tom Marshall: Absolutely.

James Wolffe: Yes.

The Convener: Even in law, is it not possible that, as Ms Ferguson posits, a sheriff could make a recommendation not just in relation to an employer but at large, as in the circumstances described? If the practice is prevalent throughout, that recommendation, because of its very nature, should be enforceable.

Patricia Ferguson: That was my point.

The Convener: Yes, you made a very important point. Such a recommendation should be made in law, not just because it was morally correct.

James Wolffe: In a way, that points up the conundrum that we all probably grapple with, which is that if the sheriff makes a recommendation that will have a binding effect on people at large, or on a group of people who are not represented before the inquiry, there is a real problem about how the interests of those people, or any views that they might wish to express, are taken into account before the recommendation is made.

Sometimes one sees recommendations along the lines of, "Consideration should be given to" the issuing of guidance, or a change of policy or whatever. Sheriffs may well frame their recommendation in such a way deliberately, recognising that it may be for a trade body to issue guidance to its members or for the Government to take forward in certain ways and that it would be wrong for the sheriff to be unduly prescriptive about the outcome of that because there are other parties whose interests need to be taken into account.

The Convener: I am not convinced—although I praised Mr Wolffe once before for being convincing versus the Lord Advocate.

Surely, if it were the case that, as Ms Ferguson says, the recommendation would have wider application and the sheriff could see that coming, would it not be possible in an FAI for the sheriff to continue the proceedings to allow representations to be made, as he or she pondered the recommendation until any such representations were made before issuing an enforceable recommendation? If the problem is that some of the people affected are not party to the FAI, but there are special cases that it can perfectly well be seen require a recommendation with general application, would it not be possible to do that, so that an enforceable recommendation could be issued after other parties have had the opportunity to make representations? Would that just be a mess?

Tom Marshall: The answer ought to be some method of translating the recommendation into a new law.

The Convener: That takes time.

Tom Marshall: However, it is much tidier.

The Convener: It is tidier, but we would be in the same position that Ms Ferguson explained. People die.

Tom Marshall: Yes.

The Convener: We do not want more time for letting people die.

Tom Marshall: No.

The Convener: I will leave it to the faculty to think of a solution. I think that we would like a solution that comes from greater brains than ours.

Alison McInnes (North East Scotland) (LD): Lord Cullen's original proposal envisaged the Scottish Government being much more involved and overseeing the implementation of responses. It seems to me that, if responses are not implemented, it is likely to be because there are a lot of knock-on effects that have not yet been worked through and the issues are quite complex. That policy making should be made either at local government level by elected members or in this Parliament.

Could we not work out a role for the Scottish Government that would require it to conduct an annual review of the recommendations that were not taken up, to see whether there are patterns? Should we be imposing something on the Government to do at the end of the process? You can imagine, convener, that what you suggest would go on forever if people started to feed back in that they would be affected by a recommendation but they have not been considered. It would not be a tidy system at all.

James Wolffe: I think that the general thrust of the approach that we agree with is that the right balance is a process that involves reporting. If the reporting process can be made more robust and effective through a requirement for Government or others to collate information and make it available, that would go with the grain of the approach that we are advocating. I have not thought specifically about the solution, but I could see that, if the basic principle is that reporting is the right way to go, mechanisms that make the reporting process transparent and robust would be entirely consistent with that.

John Finnie (Highlands and Islands) (Ind): I want to talk briefly about participants, who are listed in section 10. Section 10(1)(d) is very specific about deaths that occur "within section 2(3)", which relates to acting in the course of the individual's employment or occupation, and lists

two participants: the employer and an inspector appointed under the Health and Safety at Work etc Act 1974. Should it also list a trade union or staff association representative?

Tom Marshall: Yes

John Finnie: That is my kind of answer. Thank you very much indeed. [*Laughter*.]

The Convener: You waited a long time for that.

John Finnie: I have a follow-on question, if I may. It concerns information that we have received that suggests that section 10 is open to

"abuse if not properly regulated."

Indeed, the suggestion is that a subsection should be drafted

"to allow the sheriff to limit, in advance, the issues in an FAI upon which any participant should be entitled to adduce evidence and the issues that such a participant should address in making submissions."

There is a further suggestion that any participant should

"provide written notice of the topics upon which he wishes to examine or cross-examine any witness."

Do you have a view on that?

11:00

James Wolffe: The general thrust of civil justice reform is in the direction of sheriffs and judges taking a much more active role in managing the cases that are before them.

I do not have any difficulty with the notion that the sheriff manages an inquiry by asking the participants to identify the issues that they particularly want to raise, or with the sheriff being in a position to determine the issues that ought to be inquired into. I think that there is a balance to be struck about how far that goes and how far, in an individual case, the sheriff will consider it right to confine parties in the way they wish to approach their involvement as participants. The principle of shrieval management of the process seems to me to be a sound one.

Tom Marshall: In my view, the answer is in the preliminary hearing—as opposed to the early hearings that we discussed before. If the preliminary hearing system works well, by the time the inquiry starts everybody should know what issues are to be explored.

Everyone will be able to give you war stories and horror stories about inquiries that have run out of control like a runaway train—for example, topics emerged as the inquiry went along, new parties appeared and other people wanted to ask questions and the whole thing grew arms and legs, to mix many metaphors. If the scope of the inquiry is mapped out before it begins, that is the stage at which people can make representations about the issues that they want to explore. Those matters can then be the subject of agreement and it will be known in advance what the inquiry will cover.

John Finnie: Who should determine the scope of the inquiry?

Tom Marshall: The sheriff, after submissions from the interested participants.

John Finnie: What would be the avenue of redress for someone who was not happy with the terms of reference?

Tom Marshall: Currently, there would have to be a judicial review of the sheriff's decision.

John Finnie: Thank you very much.

Roderick Campbell: This is a question for Mr Marshall, on the use of summary sheriffs. The bill provides for them potentially to be involved in fatal accident inquiries. Do you have a view on that?

Tom Marshall: I do not see any particular difficulty with a sheriff of any description hearing an inquiry. The important factor must be whether the person is sufficiently experienced and capable of dealing with a matter of this sort.

I am sure that members of the committee are well aware that the qualifications that are required to become a summary sheriff are exactly the same as those that are required to become a sheriff; in effect, they are the same as those that are required to become a senator of the College of Justice. It is difficult to imagine that people who apply to be, and will be appointed as, summary sheriffs will be anything other than experienced solicitors or advocates. It is also difficult to imagine that the sheriff principal would appoint someone who was not competent, whether they be a summary sheriff or a sheriff, to hear an inquiry. I do not see any particular difficulty with that. If it is simply a question of status, perhaps that is something that people should get over.

The Convener: The sheriffs are sitting right behind you—and they are sharpening knives. [*Laughter*.] No, they are not.

Tom Marshall: I do not know whether summary sheriffs will be admitted to the Sheriffs Association or whether there is to be a separate summary sheriffs association. One would hope that they are more collegiate than that.

The Convener: Well, they are certainly listening.

James Wolffe: We have expressed our reservation, which is around the question of how an inquiry would be perceived if it were held before a summary sheriff with the jurisdiction of a summary sheriff.

The Convener: I have a little follow-up question. Should sheriffs retain discretionary powers to award expenses in FAIs, under specific circumstances?

Tom Marshall: I see that the insurance companies are exercised about that matter. The discretion to award expenses seems to have been rarely exercised in the past. To rule it out of account altogether seems to go too far.

James Wolffe: May I reflect on that point and come back to the committee in writing?

The Convener: Thank you, yes. That concludes my questions. I thank you both for your evidence. I suspend the meeting for a couple of minutes to allow the sheriffs to take their seats.

11:06

Meeting suspended.

11:07

On resuming—

The Convener: I welcome the second panel of witnesses to our meeting. We have already previewed their attendance. I welcome Sheriff Gordon Liddle, who is vice-president of the Sheriffs Association, and Sheriff Nikola Stewart, who is also from the Sheriffs Association. I thank you both for your written submissions. I know that you heard a deal of the previous evidence, so I will go straight to questions from members.

Christian Allard: Good morning. I asked earlier about location. Should we include in the bill that the inquiry should be held locally, if possible? In the Government's explanatory notes it is stressed that it is likely that most FAIs would still be held locally, however that is not in the bill. Do you think that there should be an amendment to that effect?

Sheriff Gordon Liddle (Sheriffs Association): There should be something on the face of the bill that makes it a presumption that the inquiry will be held locally. There are a number of interested parties in an inquiry, not least the family of the deceased. I appreciate that the family has a different role to play in attending an inquiry from those who might have to do something on the back of a finding. It can be difficult for families to travel long distances.

Another equally important aspect is that often cases that lead to an inquiry have a local flavour—the people in the local community are interested in what happens and what the outcome will be. Those people would be excluded from a public inquiry if it were to be held elsewhere.

Christian Allard: Some inquiries can be very complicated and focused on a particular subject, for which we might need a sheriff who has specific expertise, but it seems that there is still a complication regarding the mechanism to decide where the FAI should be held. Could there be conflicts between sheriffs principal about the location and the way in which they are consulted about the location?

Sheriff Nikola Stewart (Sheriffs Association): I am not aware that that is currently an issue. The bill may cause us some concern in that the Lord Advocate is effectively being given the power to locate the FAI in the first instance. We would be concerned that the local aspect could be overlooked in favour of a more centralised view.

Christian Allard: The submission says:

"However in practice this can only be done with the consent of both sheriff principals involved."

Could we end up having the contrary effect, with everything staying local and there being reason for an inquiry to be done by specialist sheriffs or to be held somewhere else? There is a balance to be struck.

Sheriff Stewart: That is the second stage. The first stage is the Lord Advocate choosing where the inquiry will go. I wonder whether that is, in effect, a safety net to avoid localising inquiries. I do not know whether that is the case. That in itself is potentially a fairly cumbersome procedure which—again—we are not entirely relaxed about.

Sheriff Liddle: I agree. It is difficult to understand how that would work, in some respects. A sheriff would make a recommendation to the sheriff principal and then both sheriffs principal would try to alter what the sheriff had thought appropriate.

Christian Allard: Do you think that sheriffs principal would automatically try to have the FAI held locally?

Sheriff Liddle: I would not want to make that assumption. I cannot see into the mind of a sheriff principal.

Christian Allard: I was more interested in the mechanism and striking a balance, as far as that would be possible, rather than there being a presumption that an FAI should be held locally or a that it should be held elsewhere. It is difficult, but do you think that the right balance has been struck in the bill?

Sheriff Liddle: It is difficult to see why it would be necessary to have an FAI outwith a sheriffdom, given that there is provision that says that an inquiry can be held outwith a court building. In a rural area where the court building might not be big enough—we all know about the Orkney inquiry that took place many years ago—we would find a

place where the inquiry could take place and take the court to that building.

Christian Allard: Thank you for that answer.

We have had a submission from Sheriff Principal Murray regarding the section that relates to repatriation of a body when death has occurred abroad. Sheriff Principal Murray seems to be saying that the bill could be changed to allow for exceptional circumstances. Do you have any comment to make on that?

Sheriff Liddle: We have to say that that enters the policy area and is not something on which we should comment.

Christian Allard: In that case, thank you very much for your answers.

The Convener: I understand that you raised concerns about the role of specialist sheriffs and about summary sheriffs presiding over FAIs. Why?

Sheriff Liddle: I know that a previous witness said that the appointment criteria for a sheriff and a summary sheriff are exactly the same, but if that is the case, why bother having sheriffs when we could just have summary sheriffs to do everything? Sheriffs have a separate jurisdiction: we have privative jurisdiction under the Courts Reform (Scotland) Act 2014. We could turn the question on its head and ask, "Why have privative jurisdiction?" The answer is that it is thought that some matters are more complex—that is the language that was used—or serious and therefore merit a sheriff rather than a summary sheriff. I do not mean to be disparaging, but summary sheriffs are meant to do more routine, and perhaps easier, work than sheriffs.

Families and even individuals who come to inquiries might expect that there will be someone with experience and weight dealing with the inquiry. An example would be the FAI in Glasgow into the bin lorry crash: the sheriff principal has decided to hear that inquiry.

I have lost track of what I was going to say.

11:15

The Convener: What you were saying undermines your argument, if you forgive my saying so, because you are saying that a determination has already been made that the inquiry in Glasgow is of such complexity and significance that it should be taken by a sheriff principal. Given that we have been told—and know—that some FAIs are pretty straightforward but are mandatory because of the circumstances, why could a summary sheriff not handle those inquires if they are seen as such, in the same way as you have indicated a sheriff principal would handle a very complex case? A very straightforward case could be taken by a summary sheriff.

Sheriff Liddle: Thank you for putting me back on track.

If an FAI is simple and is going to lead to a formal finding, it takes very little time. I accept that that would not require a sheriff principal. However, one does not know how complex or serious an inquiry will be pretty well until the preliminary hearing. It is only then that the sheriff, having been presented with what the parties think is straightforward, might realise that the matter is not straightforward at all and will require further investigation. We have powers to say that we want to hear evidence in relation to one thing or another. The question would be, "Who is the gatekeeper?" However, it is a question that might not have much force or point behind it because if the case is simple it will not take up a great deal of shrieval time.

Sheriff Stewart: The system is inquisitorial. That rightly puts a lot of responsibility on the sheriff. It seems appropriate that the person who exercises that responsibility should have the experience, and the confidence that comes with experience—for example, to direct investigations in a way that was not anticipated. We have all experienced that; not infrequently sheriffs see something in an apparently straightforward case that grows legs, and it needs experience to see that and confidence to direct it.

The Convener: We appreciate that. It might be, however, that, if we went down the route of an early hearing, it would be pretty clear that there were no complexities—although I understand that the unexpected can happen—and a summary sheriff would be appropriate.

We will move on. You are not happy about summary sheriffs but you are not happy about specialist sheriffs either. Specialist sheriffs would seem to be even better than ordinary sheriffs. Why are you unhappy about specialist sheriffs, who will have expertise through dealing with matters day in and day out?

Sheriff Stewart: Will they? Both proposals are additions to what was anticipated when summary sheriffs and specialisation were mooted. There are new areas into which these beasts are heading. It is a decision for Parliament as to whether that is appropriate. We have reservations, in that it may create the feeling in the public mind that there are important and less-important fatal accident inquiries, that the decision is made when the Lord Advocate assigns a fatal accident inquiry to a particular sheriffdom, and that if a part-time summary sheriff takes up an FAI it may not get the attention that it would get if a more experienced sheriff got it.

The bill encourages judicial management. That is a good thing—we are absolutely happy about it—but it demands skills and experience. Of course, anyone who is given the position will have training, which is a good thing, but experience is harder to acquire.

I come back to the concern that training goes hand in hand with confidence—the confidence to say that a case does not have a link with the sheriffdom so it should be moved somewhere else, and the confidence to get in touch with the other sheriff principal. All those things put an enormous responsibility on the sheriff.

The Convener: We have judges in the Court of Session who specialise. I do not think that people have problems with that, so I do not know why there should be problems with specialisation for sheriffs in particular cases. The public understands that some cases are very complex and that others are less so. Its being less important does not diminish an inquiry. I find it difficult when you say that we cannot have summary sheriffs because—to put it in colloquial terms—they are not in the same league.

Sheriff Stewart: I am not saying that.

The Convener: You do not want summary sheriffs to hear such cases, but neither would you have specialist sheriffs because they would be another class of sheriff. It is as though you want just one class.

Sheriff Stewart: The analysis is more complex than that. We are considering the process and continuity of hearing cases. There are particular difficulties. The process gets easier if a local sheriff is allocated to deal with an inquiry locally—in that case the sheriff is in charge of the preliminary hearing and guides it through to the end of the process. Importing part-time sheriffs or summary sheriffs would raise difficulties for court programming. All those things become more difficult.

The Convener: I will leave it at that, but you can see that I am not convinced.

Sheriff Liddle: We have to keep in mind the size of our jurisdiction: there are only 140-odd sheriffs in the whole of Scotland and they are spread out all over the place. It would depend on how so-called specialists were selected. Within Edinburgh sheriff court where I sit, we have enough sheriffs to have several specialisations, which means that a sheriff might have more experience dealing with a certain type of work because they do it regularly. If a number of sheriffs in Scotland were made specialist sheriffs, they would not only be specialist sheriffs but would have other duties within their courts. That would probably lead to something that I think is undesirable—specialist centres. That would take away from the local aspect of inquiries.

Sheriff Stewart sits in Lanark, which has one and a half sheriffs. Of course, you cannot have half a sheriff, but there is enough work for one and a half sheriffs. Sheriff Stewart has dealt with a number of FAIs. If specialisation were to be introduced, I doubt that she would be designated as a specialist sheriff, because she would not be able to do it. However, she deals with FAIs locally and they have a local flavour and quality. There is a point to that.

Sheriffs do runs of specialised work. An example of that is the family sheriffs in Edinburgh, where we recently piloted domestic abuse sheriffs. The pilot came to an end and was rolled out so that we all became domestic abuse sheriffs. We all have that specialisation badge, but it simply means that we have been trained in that. I do not know whether that assists your understanding of how specialisation works.

The Convener: It is fair enough for you to put that out there and for your position to be challenged. It makes a change to challenge sheriffs—they are normally the ones who challenge everyone else and tell people when to be quiet. [*Laughter*.]

Alison McInnes: I know that you were both present when the previous witnesses were giving evidence.

Sheriff Stewart: We were here for part of the time.

Alison McInnes: You were here towards the end, so you will have heard the lengthy exchanges that we had about sheriffs' recommendations. It is important to hear your views on whether the proposals in the bill will ensure that sheriffs' recommendations will be taken seriously. Do you think that the bill goes far enough?

Sheriff Liddle: As judges, the nature of what we do leads to us being functus—that is the point. Therefore, what we have determined becomes no longer part of what we have control of. It would be very difficult if a sheriff had to maintain some sort of control over what happens, and try to case manage that in some way or deal with inquiries coming back in. It would be almost impossible to do that.

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

I will give you a couple of examples of that from my experience. If an inquiry finds that there has been medical negligence, that is likely to lead to the appropriate organisation making inquiries

about that and, in the most severe cases, to a person being struck off from practice. If there has been an accident at work or something like that—a health and safety issue—and the recommendation that comes out of the inquiry is disseminated, any employer or organisation that knows about that recommendation but does not implement it will be placing itself at risk and the insurers are likely to be unhappy about that.

I am trying to illustrate that there are other people in the background who are interested in ensuring that recommendations are implemented. Unions and so on will take employers to task if recommendations are not implemented. However, I do not think that sheriffs have the resources to deal with case management beyond issuing a determination.

Alison McInnes: Do you think that, if you had the resources, it would be appropriate for you to follow the matter up? Surely, you want to see your recommendations being implemented. Would you go so far as to want some of them to be legally binding?

Sheriff Liddle: I think that it is for others to do that. I do not think that the particular sheriff would be able to continue that sort of case management. As has been said before, you could deal with that in this place. It is for the Government to legislate if something requires legislation. I do not feel that I should be a law maker.

There is a difference between an inquiry and practically everything else that I do in court, which is adversarial. An inquiry is not about me making a ruling that people must follow; it is about my conducting an inquiry, which may involve asking other people to give evidence, until I am satisfied that I understand what went wrong, if something went wrong. The pronouncement is of what went wrong and what I think, on the basis of the evidence that has been presented to me, would have prevented that and might prevent its happening in the future. It is not a ruling against anyone; it is the result of my conducting an open inquiry into the facts.

Sheriff Stewart: The concern is that, if a recommendation becomes a ruling against someone, we will be looking at a very different animal.

The Convener: We understand the complexities; we are just trying to find out whether there is a way around them.

If Alison McInnes does not mind, I will bring in Patricia Ferguson, who has an example. Were you here when she gave her example previously?

Sheriff Stewart: Indeed.

The Convener: I think that she makes a fair point.

Patricia Ferguson: What I am proposing is that sheriffs should be able to make a recommendation that would be binding, when they feel that it would be appropriate to do so, and that there should be a mechanism whereby they can call their recommendation back, at a point in time that is laid down, to see whether it has been implemented. The person against whom the finding had been made would also have a right of appeal. That would be an attempt to make the process manageable and not drag on for ever.

The point that I made earlier is that if we are truly to learn the lessons and if it is quite clear that an accident or incident could have been prevented if a certain course of action had been taken—I gave an example of where that was the situation—surely we must find a way to make a recommendation binding to prevent further loss of life.

As I said earlier, I accept that in legal terms the organisation or the institution leaves itself open to all sorts of challenge, problems with insurance and so on. Surely, however, as a moral imperative rather than a legal one, we must try to prevent future deaths from happening if we know that we can. In the example that I gave to the previous panel, it would have been very clear that that was the case.

11:30

Sheriff Stewart: I suspect that the difficulty may be in getting to that certainty. That is where the whole process may become cumbersome, as was indicated earlier. I know that it is a concern of family members that an inquiry is held, dealt with and concluded. It seems to me that what you are anticipating potentially involves changing tack at a certain stage in the inquiry and going from an inquisitorial system into a more adversarial system.

In such a system one would perhaps have to think of pleadings and of bringing in a more involved form of process so that the person against whom the recommendations are made—or it could be many bodies; the implications could be fairly diverse—would potentially be involved in giving answers. It is the same as for the Parliament: if it were to take the responsibility and go down the legislative route, it would have a process for investigating all the potential difficulties.

A sheriff may not have that opportunity. Although in hindsight we can look at decisions and take the view that “If only that had been promulgated, lives could have been saved,” I am not sure, without that kind of inquiry, how often that certainty can exist. The issue is how we get to that; crossing the boundary might be difficult.

Patricia Ferguson: With all due respect, as the convener mentioned earlier, if the idea is that Parliament then legislates, that would mean another delay being put into the system. The incidents that would be looked at may have happened four, five or six years previously, and we do not know whether there could have been preventable deaths in that period.

Sheriff Stewart: Absolutely—I take your point.

Patricia Ferguson: My suggestion would be to give sheriffs the discretion to make binding recommendations where they think that it is appropriate. Those against whom the recommendations were made would have a timeframe within which to act, be brought back or exercise a right of appeal if they felt that the judgment had not understood the complexities of the matters before them.

The proposal is an attempt to get action moving and to get something in place in order to make sure that we prevent as many deaths as we possibly can. I accept that it is not perfect, but I think that we have to have that debate.

Sheriff Liddle: We of course can see the issue and have personal sympathies with it. The problem is that we would change the nature of the beast entirely by doing what you suggest, because any parties involved in the inquiry will have in the back of their minds that there might be a finding, as opposed to a recommendation, coming out of the FAI, and that will turn it into an adversarial process. Having an appeal mechanism on the back of it, which would extend the process, makes that especially so.

I fully understand that legislation takes time, but we cannot be legislators.

Sheriff Stewart: Another concern of mine, frankly, is that it may also expand every single fatal accident inquiry. Rather than having parties directly concerned with a specific death, there might be bodies coming in that are concerned that there may be binding determinations. It may become more cumbersome and more difficult for the family and for everyone from day 1.

The Convener: We see that it is not easy.

Elaine Murray: On that specific point, we have also discussed the way in which recommendations are reported. Perhaps what the witnesses are saying is actually an argument for the Scottish Government being more involved in the publication of the recommendations so that it is on top of the issues, rather than the role being relegated to the court service.

Sheriff Liddle: I would welcome that.

Elaine Murray: Perhaps the Government should be doing that so that it can learn the lessons from the recommendations that are made.

Sheriff Liddle: I think that that may go beyond what we should be discussing, from the point of view of our not entering into an area of policy, as that would be an area of policy. However, on a personal note, I would welcome that level of involvement—where something can be done.

Christian Allard: Turning away from policy to an understanding of the mechanism, after an inquiry do you sometimes make recommendations to the Scottish Parliament, the Scottish Government or the United Kingdom Government? Or are your recommendations never to a legal body such as a Government or a Parliament?

Sheriff Liddle: I am not sure that I fully understand the question.

Christian Allard: Sorry—I will rephrase it. Would it be possible that you might make a recommendation to the Government and to the Parliament as a way of passing the whole inquiry to another level, if you feel that it needs to be done?

Sheriff Liddle: No, we do not do that, because that would politicise what we are doing. Sheriff Stewart and I have both been involved in FAIs and we have experience of them. The exercise in an inquiry is to identify what has gone wrong and why it has gone wrong. The recommendation—on the back of finding all of that out—is a practical solution, informed by expert evidence, to prevent the same thing from happening again. It is for others to pick up on the recommendation and to take out what needs to be done to prevent the situation from happening again. It depends on what comes out of the inquiry—it would not be possible to legislate for the variety of things.

The Convener: Surely you would make recommendations to the Health and Safety Executive.

Sheriff Liddle: Yes.

The Convener: That must be almost mandatory.

Sheriff Liddle: Recommendations are made to professional bodies of all sorts.

The Convener: This is just to clarify matters—

Sheriff Liddle: Of course, thank you for that.

The Convener: You do not just make a recommendation at large; you point the recommendation at groups such as employers, the HSE and health boards.

Sheriff Liddle: But not to the Government—I would not want to do that.

The Convener: No, we make recommendations to the Government. Sometimes it pays attention and sometimes it does not.

Margaret Mitchell: I want to ask about delays in holding FAIs, generally, and for your comments on whether preliminary hearings will help to prevent delays by making sure that the court is ready to go. I also ask for your comments on something that is not in the bill, which is the idea of an early hearing to ensure that within three months there would at least be some indication of whether an inquiry is going to go ahead or, if not, what the problem is.

Sheriff Liddle: A preliminary hearing is an important matter. From personal experience, the sooner that the sheriff can get a grasp of what the inquiry is about, the sooner they can take a view on whether it is something that is formal and can be dealt with quickly—everyone finds out what is happening. Alternatively, the sheriff may look at the matter and see that there are issues that had not been envisaged that need to be looked into, which may lead to a further preliminary hearing.

As far as time is concerned, I am conscious of the fact that a lot depends on the nature of the death, the nature of the inquiries that the Lord Advocate may make into that and how quickly those inquiries are made. We sheriffs do not have any control over that. I would like to see inquiries moved as quickly as possible into the court and I think that preliminary hearings are a great idea.

Sheriff Stewart: I am not sure what the other option is. Am I picking it up correctly that the suggestion is to bring the matter before the court in advance of the court being seized with the matter?

Margaret Mitchell: I have probably conflated things, which I should not do because they are quite distinct processes. The early hearing would be held to discover where things stand—in other words, to concentrate the minds of the Crown Office and Procurator Fiscal Service on the fact that, if it has not made progress, the relatives will be informed why and the sheriff will be asking what the position is. It would be about procedure, rather than looking at any facts in the case.

Sheriff Stewart: Would this take place after the application is before the court, or before that? That is what I am not clear about.

Margaret Mitchell: Not even then—the Crown Office and Procurator Fiscal Service would be looking into the facts of the investigation to decide whether, and when, they would hold a FAI.

Sheriff Stewart: The difficulty is that the matter would not yet be before the court. If that were to be the case—if I am right in this—a judge would in effect have to be a minute taker. Sheriffs have no power to do anything in that situation. Until the application is before the court, what can we do with it?

Margaret Mitchell: My point was that the hearing would be held within three months if an inquiry was not going ahead, but that would concentrate the minds of those in the Crown Office and Procurator Fiscal Service, who would come and explain where they were and whether the delay had been caused by the complexity of the case. Lord Cullen suggested that, if you did not have a clear idea of when an inquiry was going to take place, you could convene informally in the sheriff's chambers and decide to meet again in another six weeks or two months to see where things stood. That way, the case would not disappear, and the Crown Office and Procurator Fiscal Service would be held to account.

Sheriff Stewart: Do we invite parties to that?

Sheriff Liddle: It is public.

Sheriff Stewart: One of the most important aspects of a fatal accident inquiry is that it is public.

The Convener: I see your point about the need for some kind of new court process, but the suggestion was not that it would be public. It would be for the family to be kept apprised of the process in chambers and in private.

I appreciate that you are asking where it would sit in the court process, if there has been no referral, but presumably what Lord Cullen had in mind was, through some amendment to the bill, to include an early hearing that would be dealt with in that fashion.

Such a hearing would be a belt-and-braces way for the family and relatives to know what the process was and what was happening. No substantial facts would be presented; it would just be a process, explaining why there was a delay, rather than someone phoning up from the Lord Advocate's office or procurator fiscal's office to tell people. However, I appreciate that you would need to know why you were there.

Sheriff Stewart: And what our powers would be.

The Convener: Yes, indeed.

Sheriff Stewart: Currently, we are discussing the idea in a vacuum. If you tell us what our powers would be, we can comment, but otherwise we cannot.

The Convener: We shall ask Lord Cullen for an amendment.

Sheriff Stewart: Perhaps making the Crown Office responsible to the family is an easier approach.

The Convener: Okay. I note your points on that.

Margaret Mitchell: On the same point, Lord Cullen also recommended that, to keep the Crown Office and Procurator Fiscal Service on its toes, it should be properly resourced and that maybe there should even be a unit within the Crown Office and Procurator Service—which I think he subsequently decided was already there under the deaths unit—to ensure that priority could be given to such cases and that they would not be allowed to slip.

Sheriff Stewart: We cannot comment on that.

Sheriff Liddle: That is because it is a policy matter relating to resourcing. We would certainly like fatal accident inquiries to be brought to court and dealt with as quickly as possible.

The Convener: Do you think that you should retain the power to award expenses in certain circumstances and have discretion over that?

Sheriff Stewart: Yes, I think that we should. Such a power is rarely used, as has been said, but to lose it would be unfortunate.

The Convener: Thank you for your evidence. That concludes this evidence session.

11:43

Meeting suspended.

11:49

On resuming—

The Convener: I welcome our third and final panel of witnesses: the Rt Hon Lord Gill, the Lord President; Roddy Flinn, legal secretary to the Lord President; and Eric McQueen, chief executive of the Scottish Courts and Tribunals Service. Thank you for your written submissions. I know that you were present for a substantial part of the previous evidence.

We will go straight to questions from members. I am looking for volunteers—or conscripts; I will take anything that is going.

Alison McInnes: One of the concerns about the system is the length of delays. Do you believe that the SCTS bears any responsibility for delays in the FAI process at the moment?

The Rt Hon Lord Gill: I do not think so. There are two forms of delay and we must distinguish one from the other. One kind of delay is between the occurrence of a death and the application by the Crown for a fatal accident inquiry. There is also the procedural question of delay once the inquiry has been applied for, before it is conducted and concluded.

Let us take the first one first. There are many reasons why there should be a delay between a death and the FAI. It may take a very long time to ascertain the cause of death. For example, in the Clutha disaster, in which the air accident investigation branch has been involved, it has taken quite a long time to find out what happened. I would not describe that as delay.

However, if there is an unreasonable length of time between the application for an inquiry and the actual holding of the inquiry, there is legitimate cause for concern. My impression is that, in current practice, once the Crown applies for an FAI, the matter is dealt with expeditiously—I am not aware of any particular deficiency in our procedures in that regard. Mr McQueen probably has more practical detail.

The Convener: Well, he was not volunteering, but you have volunteered him—or he is a conscript.

Eric McQueen (Scottish Courts and Tribunals Service): I am well and truly volunteered.

I can certainly give more information if that would be helpful to the committee.

As the Lord President says, we do not see a particularly prevalent picture of delays in the court system at the moment. Nevertheless, we realise that, as with any part of the justice system, there is a duty on us to try to make sure that there is continuous improvement in the process.

Once cases come to court, the important point is that there is a period before it is appropriate for an FAI to go ahead, because quite clearly the parties need time to prepare for the hearing. About six to eight weeks seems to be the minimum period for preparation for the start of an FAI.

We have about 50 FAIs a year on average; obviously, the number varies, depending on particular accidents happening, on a yearly basis. About 45 per cent are one-day hearings, and they are largely held within three to four months of the fatal accident inquiry application coming forward. A further 45 per cent are hearings that last between two and 10 days. Most of those take place within three to four months, with some possibly taking place within seven months if they are particularly long or if more evidence is required. Only 10 per cent of cases are of long duration—of about 11 days or more—and most of those will be held within a four to five-month period, with some of the longer ones possibly taking place within nine to 10 months. We are certainly not aware of there being a problem for the parties involved in FAIs or of the issue being raised in the evidence sessions.

A good example that was reported in the media last night relates to the tragic accident involving a bin lorry in Glasgow before Christmas. The FAI has been set up and was due to start in July but, because of issues with the parties in terms of taking evidence, there is now some doubt over whether it will proceed on its scheduled date.

That is quite the norm for complicated FAIs. There is no point in rushing things to meet a set date. It is a question of making sure that the parties are ready and prepared to go and that the evidence has been secured, so that we can be sure that we have an FAI that will start and be completed within the planned timescale.

Alison McInnes: Lord Gill, in your written submission you suggested some specific case management powers that would help move things along in relation to written evidence being tabled. Do you want to talk in a bit more detail about that?

Lord Gill: I would urge two points on the committee.

First, subsections (3) and (4) of section 1 are at the very forefront of our consideration. Sometimes it is quite easy to lose sight of what an FAI is all about. It is made very clear in subsection (3) that the purpose of an inquiry is twofold: to

"establish the circumstances of the death",

which is a straightforward factual question; and to

"consider what steps (if any) might be taken to prevent other deaths in similar circumstances",

and there may well be cases in which that second question does not even arise.

If we look at FAIs in the context of that subsection and the context of the next subsection, which says that

"it is not the purpose of an inquiry to establish civil or criminal liability",

we begin to see that, in fact, an FAI is not a free-ranging operation in which all forms of evidence are admissible and relevant. It has a fairly tightly circumscribed remit. That is the first point.

The second point is that, in any inquiry of this nature, effective case management is the key to the whole thing. There has to be effective case management in the preparatory stages, and then, once the inquiry starts, efficient and competent chairmanship is required to ensure that the inquiry addresses the relevant points and that other questions are not gone into. That makes considerable demands of the presiding sheriff but, as long as sheriffs keep it in mind, they should be able to conduct such inquiries expeditiously.

Margaret Mitchell: On delays, I note that Mr McQueen says that of the 50 inquiries that are held, on average, every year, only 10 per cent go beyond 11 days and may take four or five months. Lord Cullen recommended that an early hearing be held within three months, which would perhaps deal with cases where there are delays. The main point is to ensure that the relatives are kept informed. Do you have a view on that?

Eric McQueen: Sorry, but I think that there are two different things. When I talked about long hearings, I was talking about the court end of the process.

There are two perspectives on early hearings, and I know that the Lord President will want to make his views known, too. For me, we need to establish what their purpose would be. There is a suggestion that they would be about keeping the Crown on its toes and ensuring a good flow of information between the Crown and the family. To me, that sounds like management oversight of the COPFS, and I am slightly puzzled as to why that is seen to be best as a judicial role. There is a fundamental question about whether that would be a proper role for the judiciary and the proper use of judicial time. In essence, the issue is about the management of the Crown Office, and how it operates and communicates with the families. Lord Cullen said himself that, if there are improvements in the way that that happens, that would negate the need for early hearings, or at least lessen the argument for them. The first issue is therefore about whether the purpose is correct.

Secondly, there is a need to think about the numbers that might be involved. Currently, the Crown Office investigates about 5,500 cases per year. I presume that the suggestion is not that there should be an early hearing in 5,500 cases. If that was to happen, using simple arithmetic and assuming that each hearing would take 30 minutes, the equivalent of two and a half sheriffs would be needed every year simply to have the early hearings. I presume that, if the early hearings were to be introduced, they would happen only in cases in which there was a mandatory FAI. That would at least reduce the number to potentially hundreds, rather than many thousands.

The first issue is about whether the principle is correct and whether conducting early hearings would be a proper judicial role. As I said, I certainly have my doubts about that. The second issue is about volume. Early hearings could clog up the court system, depending on whether they were held in all reported incidents or just in cases in which an FAI was mandatory.

As I said, the Lord President might well have views on the propriety of there being a judicial role in that regard.

Lord Gill: Ms Mitchell, are we talking about an earlier hearing than a preliminary hearing, which will be conducted under section 15?

Margaret Mitchell: Yes. It is of a quite different nature. It is about trying to explain to the relatives what is happening; it is not to establish facts or to say whether the case is ready to go to court. It is to keep the relatives informed and to ensure that the Crown Office and Procurator Fiscal Service does that. We have heard in evidence that it does not always do that just now. If not the Crown, who will do that?

Lord Gill: I have to say that I am not really enthusiastic about the idea.

Margaret Mitchell: I can tell.

Lord Gill: It is not that I am not conscious of the need for expeditious conduct of the process, but I am just not sure that that would be the best way to go about it.

The court must be very careful not to trespass on Crown prerogative. The whole question of initiating an FAI lies with the Lord Advocate. I would not like the court to be put in the position of exercising some supervisory role over the Crown's decision-making process, as that would give rise to a serious constitutional issue. In addition, it could be very expensive for such meetings to be held regularly. There would be a considerable public cost to that, particularly if lawyers were involved. There would also be a tendency to have meetings for the sake of it rather than to achieve anything.

The real answer would be for the Crown to establish good protocols of conduct whereby the relatives would be kept in touch and would know what was going on. We could achieve the same thing without the need for meetings.

12:00

Margaret Mitchell: Who would monitor that? If those protocols were not adhered to, who would pick that up? That is the problem.

Lord Gill: That is a difficulty, but I would not like to see the court attempt to exercise some supervisory authority over the Lord Advocate. That would be constitutionally wrong.

Margaret Mitchell: Could anyone oversee whether the Crown Office and Procurator Fiscal Service was adhering to the protocols in a reasonable timescale?

Lord Gill: My experience has been that, particularly in controversial cases, the relatives tend to be fairly vocal if there is delay or a failure to give answers to what they see as straight questions. There is a degree of scrutiny of the process in most cases. The answer is for the Crown to make plain its recognition of the need for expedition and to produce a regime for informing everybody with an interest of exactly where they are.

Margaret Mitchell: The tenor of what we have heard so far is that there is not really a problem with delays except in the odd one or two cases. Perhaps this is not the message that you intend to put over, but I feel that there is a bit of a glossing over of the real hardship that families face when they do not get information. That happens—they do not get information and they do not have the wherewithal to do anything about that.

Lord Gill: I sympathise with that point of view. It is difficult for the families of people who have been killed in accidents to accept that time is passing and nothing seems to be happening. However, as we all know, there are good reasons for that in many cases, and as long as the Crown is able to articulate those reasons, public confidence is maintained.

The Convener: We can ask the Solicitor General about that next week. The ball is in the Solicitor General's and Lord Advocate's court.

Eric McQueen: I want to confirm one point about delays. I am sorry if I gave the impression of glossing over. When I talked about delays at the court end, I was talking about delays from the point at which the court is informed that an FAI is proceeding until the time that the hearing takes place. I fully accept that there is a much longer intervening period, which goes back to Margaret Mitchell's point about early hearings. I was not trying to suggest that that is not an issue—

The Convener: No. We accept that there are many reasons why there might be a long delay before a decision is reached if it is not a mandatory FAI—or even if it is a mandatory FAI. We concur with the point about complexity in some cases, but we thought that we would test the idea of early hearings. As usual, we have received contradictory evidence, but that is all jolly—it is all grist to the mill.

John Finnie: We keep hearing about families, who are absolutely at the heart of the matter, but there are also issues for work colleagues and the public. As elected representatives, we sometimes have to fend off press inquiries about deaths for many months while we wait for decisions on whether there is going to be an FAI or a criminal prosecution. You may say that the matter reaches you further down the line, but how can we address that? It is all very well to keep families involved, but how are the public kept involved?

Lord Gill: I am not sure that I can give you a satisfactory answer to that. So often the Crown's processes are reserved to the Crown. There could very well be cases where the Crown would

consider it not to be in the public interest to be making announcements and statements. I can think of several very good reasons for that: there might be doubt as to the cause of death, or there might be a need to carry out confidential inquiries and obtain expert views. Sometimes, these things take a long time. If it is just a question of the Crown saying that, I cannot see any problem with it. However, there might be a perception that, because the Crown is not saying anything, in some way or another there is a culture of secrecy, which I think would be a wrong perception.

John Finnie: It is a challenge. I think that everything should be done in the public interest. The family is part of the public interest, but the most important thing is that things are done in the public interest.

Lord Gill: I take it that you accept that there are cases where it takes a very long time to find out the cause of death.

John Finnie: Yes, indeed. I would dearly love to share an example with you, but, for obvious reasons, I cannot. It is one where there are various layers of interest. There is a family interest, a community interest and an on-going interest. It becomes very complicated.

Lord Gill: Many years ago, I was one of the senior counsel in the Lockerbie inquiry. It took several years before the Crown was in a position to hold the inquiry, for very good reasons.

The Convener: We will not get into Lockerbie. John Finnie and I will back off from that—it is for another day.

I call Christian Allard, to be followed by Elaine Murray, Jayne Baxter and Rod Campbell.

Christian Allard: Lord Gill, you just spoke about the Lockerbie disaster, which comes into my question regarding—

The Convener: I do not know why I bother to breathe even—just go ahead, Christian.

Christian Allard: My question is about deaths abroad. Some people have asked whether, in cases of deaths abroad, the body should always come back to Scotland. Are you sympathetic to the idea that, in exceptional cases, a death could be investigated without the body coming back to Scotland?

Lord Gill: I have no strong views on the matter. I doubt very much whether there would be many cases where that would be a problem. If the Parliament wants to enact such a provision, I have no strong views about it. It could be very useful in some cases.

Christian Allard: Thank you for that answer.

The Convener: Christian, before you move on, I think that Gil Paterson wants to ask a supplementary.

Gil Paterson: No. I have a different question.

The Convener: Right, it is a completely separate question. Sorry, Christian.

Christian Allard: I go back to the end of the inquiry process. Are you sympathetic to the call for the recommendation of the sheriff to be binding?

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

Christian Allard: We heard this morning that adding that to the bill could change the process of an inquiry altogether. Do you agree?

Lord Gill: Yes. Let us suppose that the sheriff made a mandatory recommendation about something that affected an entire industry. Committees sit for years devising safety codes. You might end up having the sheriff in Forfar deciding on some recommendation that would acquire legal force. That cannot be right.

Christian Allard: I have another question. You talked about a sheriff being located in Forfar. Another question is where an inquiry would take place.

The Convener: I like the way you put links to your questions, like a BBC interviewer. Off you go.

Christian Allard: Does the bill strike the right balance between encouraging special cases to be taken elsewhere and keeping the idea that an inquiry should be held locally, if need be? Should the bill provide that the inquiry be held locally if that is needed?

Lord Gill: I think that in most cases it will be pretty obvious that the inquiry should take place in the jurisdiction in which the accident happened, but there will be cases in which it is more appropriate that inquiries take place where the families are. That gives us the necessary degree of flexibility. I am all in favour of that.

Christian Allard: Are you happy with how the bill is drafted? Does it strike the right balance?

Lord Gill: Yes. I have no criticism to make of the bill in that regard.

The Convener: So, there is no need to include a presumption that the inquiry be held locally, as the sheriffs suggested.

Lord Gill: No—I do not think that there is. The idea is to keep things as flexible as possible, because we never know when the unexpected will happen.

Elaine Murray: I come back to the sheriffs' recommendations. The bill proposes that the SCTS be delegated to collate and publish responses, whereas Lord Cullen's original recommendation was that the Scottish Government should do that, thereby charging the Government with responsibility for overseeing the process and determining whether legislation should proceed from recommendations if, for example, they could affect an entire industry. Are you happy with the role that the bill will give to SCTS? Does it have implications for the resourcing of SCTS? Would Lord Cullen's initial recommendation that the Government be responsible for the function be a better option?

Lord Gill: I submitted a memorandum on the bill, in which I was—to say the least—unenthusiastic about the idea. It seemed to me then that the SCTS was not the appropriate body to have that responsibility. On the other hand, I have to say that I can think of no other body that would be more appropriate. I have therefore come to the view—I think that Mr McQueen shares it—that as long as we are properly resourced to do the job, the SCTS undoubtedly has the skills to do it, so I am not opposing that provision any more.

Elaine Murray: I was not questioning the SCTS's skills to do the job. The question is whether, given that recommendations could require legislative change, it would be better for the Government to take that responsibility because it would be responsible for introducing legislation.

Lord Gill: The Government is always completely informed of the decisions and views of the SCTS. I do not see that as a big problem. Mr McQueen sees the issue from a management perspective.

Eric McQueen: Obviously, sheriffs' determinations and recommendations would be published and would be shared with the Scottish Government. As the Lord President suggests, we are being pragmatic rather than being particularly happy about the situation. Nevertheless, we see a logical link; the SCTS website would include the determinations, recommendations and responses to them. For openness and transparency the information would all be there for everyone to see. We do not have a particular skill in assessing responses, so we would need to put in place a function to deal with that aspect. We have made it clear to the Scottish Government what resources that would take and it is prepared to support us by providing those resources, if need be.

Elaine Murray: Is the financial memorandum adequate?

Eric McQueen: We have agreed that it would require in the region of £60,000 a year to provide a function to deal with responses to recommendations, with redaction, with legal advice that we require on recommendations, and with subsequent publication.

Jayne Baxter: I will follow on from that point—yet another link. What would be the practical implications for the SCTS if more mandatory FAIs were required? Would there be a resource implication?

Eric McQueen: As always with such things, it would depend. How long is a piece of string? The answer to your question would depend on how many mandatory inquiries there were and what the specific cases were. We do not believe that the types of cases that are specified in the bill will have a major impact; some can already be progressed as discretionary FAIs at present.

12:15

The Crown Office expects, having made an assessment, that the number of additional FAIs would probably be fewer than five in any one year. The average number is currently about 50 in any year, and ranges from 30 to 60. As long as the figure is within the tolerance zone, it will not be a major issue. If changes are made later to the bill that would lead to a much larger increase in mandatory FAIs, possibly with longer-running FAIs, there would quite clearly be a bigger resource issue. The provisions in the bill as it stands, however, do not give us any major concerns in that respect.

Jayne Baxter: We heard evidence on 5 May and again this morning about people who are the subject of mental health detention. If a person commits suicide while under such detention, should that, Lord Gill, trigger a mandatory FAI?

Lord Gill: I have to say that I am not convinced that it should. There are many fatal accidents in which the cause of death and the precautions that could have avoided it are completely open and shut. In suicide cases, there is very often no need for an inquiry because the circumstances are completely conclusive with regard to the cause of death. Additionally, it would be very difficult to legislate in such a way as to make FAIs mandatory only for those particular deaths. To be honest, I cannot see the justification for that.

Jayne Baxter: One of the justifications might be that risk to people who are in the care of the state should be minimised. If there are circumstances relating to a person's accommodation or care that might have contributed to their suicide, those need to be identified and acted on.

Lord Gill: I see that point, but I think that we can rely on the good judgment of the Crown to identify exactly the cases in which such issues arise and cases in which they plainly do not.

The Convener: Section 2(4)(b) refers to

"a child required to be kept or detained in secure accommodation."

Should that provision be broader to cover children who are in the care of the state rather than just those who are in secure accommodation?

Lord Gill: Here, again, 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, and—

The Convener: Why would you pick secure accommodation and say that that circumstance is special, while saying that there should not be a mandatory FAI for a child who is not in secure accommodation but is in the care of the state?

Lord Gill: I am not taking a rigid position on the matter. If that is what the Parliament wants, I am certainly not opposed to it.

The Convener: I am just seeking your view on what the distinction should be.

Lord Gill: At present, the Crown exercises its prerogative responsibly, and we can rely on that. If Parliament decides that it wants something stronger than that, I am not here to argue against it.

The Convener: I see. It may be that the committee takes the view that such children would be in a special circumstance, and that the state is in a different role from any other parent or foster carer and has duties.

Lord Gill: Madam convener, that is a perfectly tenable point of view.

The Convener: I love to hear that. I do not hear it very often, so I will write it down and commit it to memory. [*Laughter*.] You might tell my party leader that as well sometime.

Roderick Campbell: Good morning, Lord Gill—or good afternoon, I should say. We have heard concern that the creation of specialist sheriffs for fatal accident inquiries could lead to a possible centralisation of the FAI process. Do you have any comments on that?

Lord Gill: 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.

The Courts Reform (Scotland) Act 2014—forgive me for mentioning it—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.

Roderick Campbell: You commented in your written submission on the powers that are available to a sheriff to decide who can participate in an inquiry. Can you expand on why you think that it is important to give sheriffs flexibility to control participation?

Lord Gill: At the end of the day, the sheriff must conduct the FAI efficiently, which means making the most productive use of the available time, eliminating unnecessary or irrelevant evidence and eliminating unnecessary or irrelevant questioning. In order to do that, the sheriff must have discretion to decide who the inquiry participants will be. The sheriff must make a judgment on that based on the circumstances of the case and the representations that are made to him by those who claim to have an interest. That is a perfectly normal facet of effective case management.

Elaine Murray: We heard earlier in evidence from the Sheriffs Association that it is concerned about summary sheriffs dealing with FAIs. I think that the association's argument was that it might not become apparent early on that a case would be complex and a summary sheriff might not have sufficient experience to deal with it as it developed. Do you agree?

Lord Gill: A summary sheriff will be perfectly capable of conducting a straightforward fatal accident inquiry. If the inquiry is more complex, a sheriff should do it.

In every case, we must trust the judgment of the sheriff principal, who will choose whomever he thinks is the appropriate person to conduct the inquiry, based on experience and expertise.

Elaine Murray: Should the bill allow sheriffs to retain the power to award expenses? It is a power that they currently have that does not seem to be replicated in the bill.

Lord Gill: I am not in favour of the power to award expenses. The awarding of expenses is a typical procedure in adversarial litigation, but an FAI is not adversarial litigation; it is simply a

concerted effort to find the truth. The only reason why one would ever wish to award expenses against a party at an FAI would be if the party had behaved unreasonably or vexatiously or had wasted time. The bill gives the sheriff the power to keep such people out of the inquiry, either by not letting them be participants or by efficient management of the case as it is being heard. Sheriffs know what they are doing; if the sheriff is in control of the proceedings, there should be no need for that problem ever to arise.

Elaine Murray: It was mentioned that that power is very rarely used. I presume that it has been used only in cases such as you just illustrated.

Lord Gill: Yes.

The Convener: I like it when lawyers disagree with each other. If the sheriffs disagree with the Lord President, that is par for the course.

Gil Paterson: I want to return to the idea of mandatory FAIs. Lord Gill touched on this, but what are the panel's views on mandatory FAIs for industrial diseases?

Lord Gill: I am not in favour of the idea of mandatory FAIs at all. First, there is a question as to the Crown's prerogative to decide when and in what circumstances an FAI should be applied for. If you make an FAI mandatory, you may trespass on the judgment of the Crown. Secondly, in many cases the holding of an FAI is completely unnecessary because the facts are staring us in the face and there is simply no need for it. That is where the Crown exercises judgment.

Thirdly, the proposal could be hugely costly to the public. I am not at all convinced that there would be any cost benefit to it. Lastly, before any judgment on the matter could be made we would need to know what difference the introduction of mandatory FAIs would make in terms of numbers. I do not know the answer to that. It rests with those who want to have mandatory FAIs to make some assessment of the number of additional FAIs there would be. At the moment, we just do not know.

Gil Paterson: Mr McQueen, do you want to comment or are you happy with that?

Eric McQueen: Not really. We do not have any information or data on what the potential cases could be, their volume or the impact of the proposal.

Gil Paterson: Would the Lord Advocate's discretion kick in? In the industry that I know well, lots of new processes and new substances are being used. Would the Lord Advocate's discretion kick in in that regard?

Lord Gill: That is exactly the sort of consideration that the Lord Advocate takes into account.

The Convener: Lord President, you have raised this case management thing—this idea of keeping a grip on the FAI and keeping it to the straight and narrow, if I can paraphrase it in that way. In your written submission, you suggest amendments to section 10 of the bill that would confer

"discretion on the sheriff as to the extent to which any person should participate."

You also talk about agreement of the evidence before an inquiry and written statements being given to the sheriff in advance of an FAI. How do you see that working? Could it wrongly preclude people from participating? Would the statements have to be drafted by somebody with a legal background? An ordinary person who wanted to take part in a fatal accident inquiry might not know how to express stuff, or stuff may be missed out that might be relevant.

Lord Gill: I strongly favour the idea that, in an inquiry procedure, as much of the evidence as possible should be presented in written form. That eliminates unproductive use of time in the inquiry. The evidence can then be taken as read, and if anyone wishes to cross-examine a witness on that evidence they can indicate the topics on which they want to do so.

In practice, we find that a great deal of the evidence—probably two thirds or more of it—is completely uncontroversial and is taken as read. I fail to see what benefit there would be in having it read out; that would only prolong the inquiry and incur public cost. That is the first point to note about evidence in writing. The preliminary hearing procedure is the key to obtaining agreement on facts at an early stage, so there is no need to lead evidence that is completely uncontroversial.

Another aspect of efficient inquiry management is limiting the participation of certain parties to the inquiry where there are topics on which they have nothing to contribute. I do not think that there is anything unfair or unreasonable in that.

12:30

The Convener: I thought that I would raise the matter, as a quite substantial part of your written submission deals with tightening up on the evidence to go before an FAI. You state that the provisions would

"allow uncontroversial evidence to be lodged in the form of a report or an affidavit".

Would there be legal aid for an ordinary person who needs to swear an affidavit? Would that not be required?

Lord Gill: I do not think that that would ever be a requirement. I was merely suggesting ways in which things could be done.

I will give you an example from the Stockline inquiry. Admittedly, that was not an FAI, but the inquiry dealt with a series of fatalities. A great deal of the evidence was obtained by the procurator fiscal interviewing witnesses and getting their precognitions. The inquiry team then followed that up with their own interviews with certain key witnesses. That system worked quite well, I thought. I am not sure that there is any need for the formalities of affidavits.

The Convener: Your submission says:

"That would, for example, allow uncontroversial evidence to be lodged in the form of a report or an affidavit".

It goes on to say that evidence could be considered and

"treated as ... evidence in chief".

That is why I raise the matter of affidavits—it is in your submission.

Lord Gill: By all means, if someone wishes to make an affidavit on something controversial, then, yes. However, so much evidence is uncontroversial that affidavit procedure would be unnecessary.

John Finnie: Lord Gill, I do not know whether you were present when I asked two of the previous witnesses about your submission. I am concerned about anything that would appear to impose a limit. I understand that you do not want a free-ranging inquiry that goes all over the place, and that you want it to be kept to the specifics, but how would you establish whether someone has something of value to say without having heard from them, either in writing or in person?

Lord Gill: That is where good case management comes into the picture. Under section 15, the whole overriding purpose at the preliminary hearing is to identify the key factual issues. If other people come along and say that they have three more issues that they want to investigate, for instance, it is for the sheriff to decide whether they fall under section 1(3). If they do not, he says so, and that is that.

John Finnie: So you are talking about participation in the actual event, rather than in the entire process.

Lord Gill: Yes. It is possible to have quite a range of participants in an inquiry, but with some of them contributing only on certain issues.

John Finnie: I understand—thank you.

Elaine Murray: I seek clarification on something that you said a little earlier on, when you were talking about mandatory inquiries. Were you saying that you were not in favour of any mandatory inquiries, or just the extension of mandatory inquiries?

Lord Gill: What I am not in favour of is a blanket requirement that every fatal accident must result in an inquiry. I honestly do not see the point in that.

The Convener: We had thought that you were saying something devastating there, as a final blow to the legal system. [*Laughter*.]

Lord Gill: No, no.

The Convener: I am glad that that got clarified—well done, Elaine.

Thank you all for your evidence. As you know, this is Lord Gill's last appearance here—he will be delighted to know—before he retires. Thank you for your very instructive and sometimes, if I may say so, entertaining answers. I really must pick up on the phrase "not enthusiastic", which is such a body blow to things.

We wish you well in your retirement. Thank you very much.

Lord Gill: Madam convener, it has always been a pleasure to appear before this committee, and I am grateful to you, your members and your predecessors for the great courtesy that I have always been shown.

The Convener: Thank you very much.

We are now going into private session, as previously agreed.

12:34

Meeting continued in private until 12:55.

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