Minister for Community Safety and Legal Affairs
Paul Wheelhouse MSP

T: 0300 244 4000
E: scottish.ministers@scotland.gsi.gov.uk

The Scottish Government
Riaghaltas na h-Alba

LEGACY 2014
XX COMMONWEALTH GAMES
SCOTLAND

Christine Grahame
Convener
Justice Committee
Scottish Parliament
Edinburgh
EH99 1SP

17 September 2015

Dear Christine

I am writing to respond to points raised by the Justice Committee in its Stage 1 Report on the Scottish Government's Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill. I would like to thank the Justice Committee for its careful consideration of the Bill. I am also appending my comments on the Committee's Stage 1 Report on Patricia Ferguson's member's Inquiries into Deaths (Scotland) Bill.

I am pleased that the Committee supports the general principles of the Scottish Government's Bill, and agrees that the legislation on fatal accident inquiries (FAIs) needs to be modernised by means of the Government's Bill.

The attached **Annex A** provides detailed responses to the specific points raised by Committee members and the recommendations made in the Report. I have mainly confined my remarks to the parts of the Report where the Committee has suggested amendments to the Bill or has sought reassurance or clarification, but I have also taken the opportunity to emphasise what the Scottish Government considers to be important issues in the Bill.

In particular, I am delighted to inform the Committee that the UK Government has given its in principle agreement that it should be possible for a mandatory FAI to be carried out for deaths of service personnel in Scotland in the same way that such a death would be subject to a coroner's inquest if it occurred in England or Wales. This will be effected by means of a section 104 order under the Scotland Act 1998 rather than the Government's Bill as this matter relates to the defence reservation.

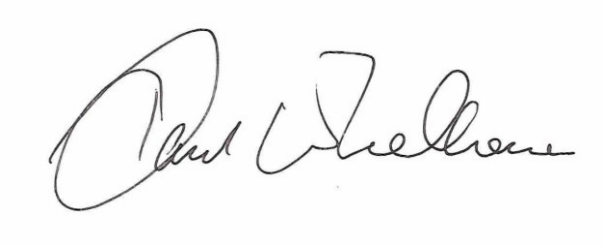
I can also inform the Committee that, following consideration of the Committee's Stage 1 Reports, I am minded to agree with Ms Ferguson that the Charter being prepared by the Crown Office and Procurator Fiscal Service should have statutory underpinning.

My comments follow the main headings in the Report.

The Scottish Government's response to the Stage 1 Report of the Delegated Powers and Law Reform Committee is attached at **Annex B**.

The attached **Annex C** provides the Scottish Government's response to the Stage 1 Report on Patricia Ferguson's Inquiries into Deaths (Scotland) Bill.

I hope that the responses to the issues raised by the Committee on both Bills are helpful.



PAUL WHEELHOUSE

ANNEX A

INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC. (SCOTLAND) BILL

SCOTTISH GOVERNMENT RESPONSE TO THE JUSTICE COMMITTEE'S STAGE 1 REPORT

The purpose of FAIs

I note the Committee's recommendation that it is imperative that there be greater clarity and understanding around FAIs, their purpose and how they relate to other death investigations and civil or criminal proceedings The Committee also recommended that the Scottish Government should work closely with the Crown Office and Procurator Fiscal Service (COPFS) to promote a better understanding across Scotland of the purpose of an FAI.

The Government's consultation paper, the Bill and accompanying documents have all explained the purpose of an FAI. Section 1(3) of the Bill provides that the purpose of an FAI is to establish the circumstances of death and to consider what steps (if any) might be taken to prevent other deaths in similar circumstances. Subsection (4) makes it clear that an FAI is not to establish civil or criminal liability. This is reiterated in the Explanatory Notes (page 5) and the Policy Memorandum (page 20) which accompany the Bill. COPFS guidance on deaths explains the purpose of an FAI and how it ties into the wider death investigation by the fiscal[1]. The COPFS website also provides information on FAIs, including FAQs[2].

Clarifying what the bereaved family should expect from the process is a matter for COPFS. This will be included in guidance referred to above which will be refreshed and also in the Charter which COPFS are developing, a draft of which has been circulated to the Committee. Having reflected on Patricia Ferguson's call for statutory underpinning I am now minded to support a Stage 2 amendment giving the Charter statutory status.

I do not accept Tom Marshall's argument that there is a conflict for the procurator fiscal in considering the public interest in having a prosecution and the public interest in having an inquiry in order that lessons may be learned for the future. Although the Lord Advocate is the head for both responsibilities there are separate teams of specialists within COPFS and separate Crown Counsel can be involved in making decisions on the prosecution of cases and on the holding of FAIs, as the Solicitor General explained during her evidence.

At the point of beginning a death investigation the fiscal (outside of mandatory FAI cases) has an open mind as to whether there will be either a prosecution or an FAI, both or neither. A virtue of the Scottish system is surely that if it becomes apparent that the death is a possible homicide, the prosecutor is already involved; and if homicide is ruled out, the Scottish version of the 'coroner' is already involved.

Mandatory FAIs

Questions were asked at Committee about the status or location of a child who dies whilst in secure accommodation. Stephen McGowan of COPFS commented that it would be helpful to have clarity in the Bill about the legislative intent and we undertook to look into this.

---

[1] COPFS Information for bereaved relatives: the role of the procurator fiscal in investigating deaths http://www.copfs.gov.uk/images/Documents/Deaths/The%20role%20of%20the%20Procurator%20Fiscal%20in%20the%20investigation%20of%20deaths%20-%20Information%20for%20bereaved%20relatives.pdf

[2] http://www.copfs.gov.uk/investigating-deaths/our-role-in-investigating-deaths

The Bill team has considered this matter further and is satisfied that section 2(6) provides for the situations discussed during evidence, such as a child absenting themself or being outwith the accommodation for school or another purpose. The provision is about the status of the child and not their location at the time of death. The provision also applies to deaths of those in prison or service custody. For example, if a prisoner dies in hospital or on their way to or from the prison then section 2(4)(a) would apply by virtue of 2(6). The Explanatory Notes accompanying the Bill clarify this further:

"A person being in legal custody or secure accommodation is defined by the status of that person regardless of the person's physical location at the time of the death. Accordingly if a person dies in hospital who is at the time of death still serving a custodial sentence, an FAI must be carried out. The effect is the same as that in section 1(1)(a)(ii) and (4) of the 1976 Act." [3]

COPFS have confirmed that they now agree that the legislative intent is achieved by this and no amendment is therefore required.

The Committee asked the Scottish Government to consider further whether the Bill should be extended to include deaths of detained mental health patients or a child who is looked after within the categories of deaths which trigger mandatory FAIs.

Mental Health Deaths

As set out in my letter of 4 June 2015 to the Committee, there are several reasons why the Scottish Government does not think that FAIs should be mandatory for all deaths of detained mental health patients.

A full FAI is not required in all cases to meet the requirements of Article 2 of ECHR (right to life) and it is not the only means by which a mental health death is investigated. Sudden, suspicious or unexplained deaths are the subject of investigation by the procurator fiscal (and/or by the Mental Welfare Commission for Scotland (MWCS)) and the Lord Advocate has discretionary power to hold an FAI into mental health-related deaths when it is considered to be in the public interest. As the Solicitor General told the Committee, the possibility of a discretionary FAI is the "final safeguard" under the Scottish system.

MWCS is automatically informed of any deaths of detained patients and has the discretionary power to carry out its own independent investigation and inquiry if there are concerns the person may not have had the appropriate care or treatment. MWCS liaise with COPFS in cases which they feel may merit an FAI. Neither MWCS nor the Royal College of Psychiatrists support having mandatory FAIs for detained mental health patients for the reasons set out in their submissions and consultation responses.

COPFS is also in the process of updating its guidance to medical practitioners to ensure that all deaths while subject to compulsory treatment under mental health legislation are reported to the procurator fiscal.

Many families of detained mental health patients may not want an FAI in the event that their loved one dies in compulsory detention. Many deaths of mental health patients will be from natural causes and old age, which are unrelated to their mental health condition, and it is difficult to see what would be achieved by an FAI in such cases.

[3] Paragraph 20 of Explanatory Notes
http://www.scottish.parliament.uk/S4_Bills/Fatal%20Accidents%20(Scotland)%20Bill/b63s4-introd-en.pdf

The Scottish Government consulted on Lord Cullen's recommendation that provision be made for the investigation into the death of any person who is subject at the time of death to compulsory detention by a public authority within the meaning of the Human Rights Act 1998. Some 74% of respondents to the question favoured the retention of the investigation by the procurator fiscal and the exercise of discretion by the Lord Advocate on completion of the investigation to instruct an FAI. Although there was some support for the alternative proposal of a case review investigation by a public authority (such as the MWCS) combined with the continuation of the Lord Advocate's duty to investigate the death and a discretionary power to initiate an FAI, it was opposed by 59% of respondents.

In 2012-13, MWCS reported on 78 deaths of patients subject to compulsion, 53 of which were natural cause deaths and 11 were suicides. There would be little public interest in having a mandatory FAI for every death when many are the result of natural causes.

I do not believe that a blanket provision making FAIs mandatory for deaths of mental health patients subject to detention or compulsion would be proportionate or justified. MWCS has, however, suggested that the current system in practice for the investigation of deaths of detained mental health patients is confusing and has gaps.

The Scottish Government accepts that improvements should be made to how deaths in detention are investigated in practice to ensure that the process is effective and timely, that it supports learning and that reviews are of a consistent quality. However, it does not believe that this Bill is the correct vehicle.

The Committee will be aware of an amendment made to the Mental Health (Scotland) Bill, laid by Dr Richard Simpson MSP which requires the Scottish Ministers to carry out a review of the arrangements for investigating deaths in hospital (in cases of compulsory or voluntary detention) for treatment for a mental disorder. The Scottish Government had already given an undertaking requesting that the MWCS and Healthcare Improvement Scotland should consider how improvements could be made and supported Dr Simpson's amendment.

The duty under what is now section 37 of the Mental Health (Scotland) Act 2015 is to undertake a review of the arrangements for investigating the death of a patient who was detained in hospital by virtue of the Mental Health (Scotland) Act 2003 Act, or the Criminal Procedure (Scotland) Act 1995; or who was admitted voluntarily to hospital for the purpose receiving treatment for a mental disorder.

The review must be carried out within three years of section 37 coming into force. The report will have to be published and laid before Parliament. In carrying out the review, Ministers will have to consult the nearest relatives of the patients where practicable.

MWCS already has a power under section 11 of the 2003 Act to investigate cases of deficiency of care, and has previously investigated homicides by patients under this power. The MWCS is working with Healthcare Improvement Scotland to build on its use of its powers under section 11 of the 2003 Act to investigate cases of deficiency of care.

The Scottish Government will now consider further with MWCS how the review can best be conducted. It would be likely that the review would involve a range of partners including Healthcare Improvement Scotland, COPFS and bereaved families amongst others.

I would hope that this review of the arrangements for investigation of deaths in compulsory detention should provide reassurance to the Committee and witnesses who think that change to the system of investigating deaths of detained mental health patients is needed.

The Scottish Government would submit that it would be premature and inappropriate to legislate on mandatory FAIs for detained mental health patients when a review required by statute is in immediate prospect.

Looked after children

The Scottish Government has committed to establishing a working group to consider the position of looked after children. Currently reviews are carried out in certain circumstances, but there is no consistent process for reviewing a child's death in Scotland.

A Child Death Review Working Group reported in May 2014, recommending that Scotland should introduce a national Child Death Review System. A Steering Group was set up to develop the system and aims to submit its report to Scottish Ministers in Autumn 2015. It is anticipated that the Steering Group will recommend the deaths of all live born children and young people up to the 18th birthday and care leavers in receipt of aftercare or continuing care up to the 26th birthday, who are resident in Scotland, should be reviewed. Other processes (e.g. criminal investigations, significant case reviews) should take place prior to a child death review, with the outcomes of these processes informing the child death review process. The aim of setting up a child death review system in Scotland is to disseminate local and national learning to reduce the mortality rate in children and young people.

It is also worth noting that the Centre for Excellence for Looked After Children in Scotland did not recommend making this a mandatory category in its submission because it said there was no certainty it would lead to improvements in services for looked after children and those leaving care.

I would respectfully suggest to the Committee that it would not be appropriate to make any changes to the system before the outcome of these Reviews. As FAIs are only one method of investigation and one which is likely to be employed in cases where there is serious public concern, I continue to believe that no other change should be made in relation to FAIs in relation to deaths of children other than the proposed extension of the mandatory category of FAIs to deaths of children in secure accommodation. I note that Patricia Ferguson's Bill adopts the same approach as the Government's Bill in this regard.

Opt in or opt out

The Committee has asked the Scottish Government to consider whether, if it was mandatory to hold an FAI into deaths of mental health patients and children in care, the Lord Advocate might continue to have discretion to dispense with such an inquiry. This would effectively be an "opt-out" rather than an "opt-in" system. The Scottish Government believes that the introduction of such a system would cause difficulties as it would raise families' expectations that there would be an FAI and could lead to an increase in bereaved families (or their legal representatives) opposing decisions to dispense with an inquiry which would otherwise be mandatory as they would feel that they were entitled by law to a mandatory inquiry. There may therefore be a rise in the judicial review of such decisions.

The number of mandatory FAIs would be likely to rise significantly leading to greater costs for both COPFS and Scottish Courts and Tribunals Service (SCTS).

For the reasons set out above, I do not believe that it is necessary or appropriate to make these deaths subject to mandatory FAIs, and, like Lord Cullen, think that the decision should be left to the Lord Advocate acting in the public interest.

Service personnel

As the Committee has noted, the Scottish Government has been discussing with the UK Government proposals to permit deaths of service personnel in Scotland to be the subject of a mandatory FAI. The UK Government has given its in principle agreement that it should be possible for a mandatory FAI to be carried out for deaths of service personnel in Scotland in the same way that such a death would be subject to a coroner's inquest if it occurred in England or Wales. This will require further detailed consideration of the legal and legislative position, however.

This change to the law will not be effected by amending the Bill as the Stage 1 Report suggests. This matter falls within the defence reservation and thus the change will have to be achieved by means of an order under section 104 of the Scotland Act 1998.

Deaths abroad

The Scottish Government accepts the concerns raised by the Committee and witnesses regarding the requirement for a body to be repatriated as a prerequisite for an FAI into a death abroad. During evidence to the Committee, the Solicitor General indicated that she would have no difficulty with there being exceptional, but justified, circumstances in which a body would not be required to be repatriated before an FAI might be held. Therefore the Scottish Government will bring forward an amendment at Stage 2 to allow for some discretion to permit an FAI to be held even when it has not been possible to repatriate a body.

Delays

Like the Justice Committee, the Scottish Government welcomes the commitment by the Solicitor General to consult on and produce a Charter including investigation milestones, which should address concerns over delays and communication and enhance the provisions in the Bill to make the FAI system more efficient. I understand that COPFS has already sent a draft of its Charter to the Committee.

The Charter proposed by COPFS aims to provide clarity in deaths investigations regarding what information the bereaved family will be provided with at the different stages of the investigation and how and when that information will be communicated to them. As mentioned, I support the Charter having statutory underpinning.

It is proposed that, in cases requiring further investigation with a view to deciding whether criminal proceedings should be instigated and/or whether an FAI should be held, COPFS will make contact with bereaved families three months after the date that the death has been reported to COPFS offering the family a personal meeting within 14 days to give them an update on the progress of the death investigation; the likelihood of criminal proceedings; and the possibility of an FAI.

It is also proposed that the Charter will explain the different stages of a death investigation, set out the commitments of COPFS in terms of keeping in touch with relatives. It will include a Frequently Asked Questions section and links to further information.

We consider that COPFS' Charter is a better option for families rather than inflexible statutory deadlines, which were opposed by Lord Cullen and by 80% of respondents to the

Government's consultation on legislative proposals and which may be observed more in the breach than the observance.

Role of the family

The Scottish Government is considering the Committee's recommendation that the requirement for relatives to make a request before being given written reasons be removed from the Bill.

The provision for a request was included in section 8 to restrict the number of letters that could result from this duty. Any of the 11,000 deaths reported to COPFS per annum (which lead to 5500 death investigations) could potentially involve a decision to not hold an FAI. As the Solicitor General said that in practice reasons are provided without a request, and the Committee has recommended that the "if requested" be removed, we have to consider whether an amendment is required to section 8.

COPFS have considered this further in the light of feedback received when consulting on the Charter and having reflected on recent experience. COPFS have received feedback that indicates that it may not be appropriate in every case to automatically provide written reasons where a decision is taken by Crown Counsel not to hold an FAI. For instance, in some suicides, the provision of detailed reasons may be too upsetting or distressing for some families and may complicate grief. Recent experience of COPFS reflects this concern.

More general feedback received is that it is crucial, in putting families at the heart of the process, to tailor communications with them according to individual needs and requirements.

COPFS recognises that the key priniciple must be that where families want detailed reasons they will get them. COPFS are committed to this principle but are aware that not all families want detailed reasons to be provided and even within families different family members may wish to be communicated with in different ways and may require a different level of detail. Therefore a blanket approach is not desirable.

In practice, in cases reported to Crown Counsel for a decision to be made on whether to hold an FAI, there will always have been some interaction between the Procurator Fiscal and the family of the deceased and views will have been sought on whether the family wish an FAI, whether they wish to be provided with written reasons and how they wish to be communicated with. COPFS will provide written reasons where the family have indicated that they wish them. This will be done sensitively and in accordance with the expressed wishes of the family on what level and type of communication they want without the need for a separate bespoke request being made.

This seems the more appropriate approach than making the provision of written reasons automatic in every case which would be the effect of removing the words "if requested to do so" from section 8 of the Bill.

I understand that the commitment to provide written reasons in accordance with the family's wishes will be underpinned within the Charter and this is the preferred approach.

Trade union participation

Under section 10(1)(e) of the Bill, a sheriff may permit any person to participate in inquiry proceedings if the sheriff is satisfied that that person has an interest in the inquiry. For this

reason, the Scottish Government does not believe that it is necessary to make special provision for the participation of trade unions or staff associations.

Sheriffs recommendations

I welcome the Committee's comments on the Scottish Government's proposals for publishing sheriffs' determinations and the responses to those recommendations, which I also believe strikes the correct balance.

I should like to clarify my comments made in evidence to the Committee in relation to monitoring compliance with sheriffs' recommendations. It is difficult to see how the Scottish Government, SCTS or indeed any other body would have the expertise or the resources to fully monitor compliance with sheriffs' recommendations. These may in any case be directed to UK bodies or may affect reserved matters. There is no evidence that recommendations made by sheriffs are routinely ignored as some witnesses before the Committee claimed. HSE gave evidence to the Committee that they take recommendations very seriously. The Scottish Government is concerned that calls for recommendations to be 'binding' would likely inhibit sheriffs from making any recommendations, and further could mire recommendations in potentially costly and lengthy appeals processes, introducing an unwelcome adversarial element into the FAI regime.

For all of these reasons, the Scottish Government has concluded that it would not be practical or realistic to require a particular body to monitor compliance with sheriffs' recommendations, far less ensure implementation. The Committee has also agreed that there could be difficulties in placing a duty on a particular body to monitor compliance with sheriffs' recommendations. We believe that the system proposed in the Bill, which is similar to that in England and Wales, will foster self-compliance, accountability and respect.

Under the Bill, all FAI determinations must be published and a copy can be sent directly to bodies that may have an interest in a recommendation made. We expect this to include safety and regulatory bodies who could act on the recommendations. To strengthen this, the Bill also requires participants to whom recommendations are addressed to respond to SCTS explaining what action if any has been taken as a result of the recommendation.

The provisions in the Bill broadly replicate the system used in England and Wales and, on balance, we believe go as far as is appropriate and workable.

Location of an FAI

The Scottish Government agrees entirely with the view expressed by Lord Gill that *"in most cases….the inquiry should take place in the jurisdiction in which the accident happened, but there will be cases in which is more appropriate that inquiries take place where the families are. That gives us the necessary degree of flexibility"*.

I note that the Committee has urged the Lord Advocate, when choosing the sheriffdom in which the inquiry is to take place, to put the families' views at the heart of the decision as well as the practicalities. The Scottish Fatalities Investigation Unit within COPFS already takes into account the views of the family when considering the location of an FAI and will continue to do so. The desires of the family are very important and will always be taken into account, but they cannot be the only determining factor. The location of witnesses or physical evidence will also have to be taken into account and if a death took place in Inverness where most of the relevant witnesses live then it may be that this will be the most appropriate place to hold the inquiry, balancing all the factors, even if the deceased and their

family are from Dumfries. The public interest in a death which occurred in Inverness would perhaps mean that overall it would be best if the FAI should be held in Inverness as there may be local concerns about the circumstances of the fatal incident.

In the case of, for example, the 2014 Super Puma FAI, the residences of the families of the 16 deceased were geographically widely spread and the FAI was held in Aberdeen as it is the centre of helicopter transport to and from oil rigs in the North Sea.

The Lord Advocate is obliged under the Bill to consult SCTS about the venue for an FAI and it may be that they will suggest that an *ad hoc* location is used rather than a sheriff court room due to difficulty in finding sufficient court capacity, particularly if a long and complex FAI is in prospect. This may mean that the FAI can take place sooner which is in the family's interests, but in a venue which is less convenient for them.

For all of these reasons, I do not believe that it is necessary to amend the Bill to oblige the Lord Advocate to "put families' interests at the heart of his decision" when deciding on the venue of an FAI as their views are already taken into account and this will continue to be the case.

Summary and specialist sheriffs

I would like to reassure witnesses and stakeholders who have concerns about the use of summary sheriffs for FAIs. A straightforward FAI, as confirmed by the Lord President, could be undertaken by a summary sheriff. If the case becomes complex then it can be allocated to a sheriff or the sheriff principal of a sheriffdom at the direction of the sheriff principal. The preliminary hearing does not need to presided over by the same sheriff who will preside over the inquiry proceedings and the complexity and other issues should be identified during the preliminary hearing(s). At Glasgow Sheriff Court where preliminary hearings are held regularly for FAIs, the sheriff who will preside over the inquiry hearing takes the final preliminary hearing for consistency, but up until that point there could be several sheriffs conducting the preliminary hearings.

The aim of the role of summary sheriffs established by the Courts Reform (Scotland) Act 2014 is to bring proportionality to the system, allowing sheriffs to concentrate on more complex casework. The same applies to FAIs, which are held in sheriff courts and managed as part of the civil and criminal programme.

Delegated powers

I note the comments of the Delegated Powers and Law Reform Committee in relation to the powers in section 34(1) of the Bill (power to regulate procedure etc.). The Scottish Government responded to the Committee on 17 August and a copy of that response is attached.

ANNEX B

Justice Directorate

Civil Law and Legal System Division

Euan Donald

Clerk to the Delegated Powers and Law Reform Committee

Room T1.01

Scottish Parliament

EH99 1SP

17 August 2015

Dear Euan

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

In its Report on the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill, the Delegated Powers and Law Reform Committee commented as below. I am replying on behalf of the Scottish Government.

The Committee recommended and commented as follows:

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

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

The Committee notes that the same powers may not be needed to bring about the more modest reforms to inquiry proceedings which are contemplated by this Bill.

The powers in section 34(1) are supplemented by power in section 34(3) to include in an act of sederunt provision which is incidental or supplemental to provision for or about any matter incidental or ancillary to an inquiry.

The Committee draws the lead Committee's attention to the fact that this provision widens even further the scope of matters about which provision may be made in inquiry rules, and that in the Committee's view the Scottish Government has not provided a satisfactory reason for taking the additional power.

Lastly, the Committee draws the lead committee's attention to the proposal in the Bill that inquiry rules made by act of sederunt under section 34(1) of the Bill would not be subject to any parliamentary procedure, and as such were the Parliament to be concerned about the Court's interpretation as to what was incidental to an inquiry, provision made under these powers could not be subject to annulment by the Parliament.

The Scottish Government responds as follows:

The Scottish Government is grateful for the Committee's detailed review of the delegated powers provisions of the Bill. In relation to each of the points put to the Scottish Government, which have been carefully considered, the following responses are offered.

Breadth of powers

The Committee has expressed the view that the Scottish Government has not explained why the powers given under the Courts Reform (Scotland) Act 2014 constitute a relevant precedent for the powers which are being sought under this Bill, given that those powers were conferred in the context of giving the Court of Session far-reaching powers to reform its own procedures and practice as part of a radical overhaul and modernisation of the civil court system.

Under the present law, any procedural matters relating to fatal accident inquiries which are not dealt with by the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, or by rules made under section 7 of that Act, are governed by the sheriff court's Ordinary Cause Rules. Lord Cullen commented in his 2009 Review of the Fatal Accident Inquiry Legislation (at paragraph 7.21) that some general sheriff court rules may not be apposite or compatible with fatal accident inquiries. He thought it was unfortunate that it should be necessary to search through the Ordinary Cause Rules in order to find rules that might apply and commented that it would be preferable that all of the relevant rules for such inquiries were held in the one place. He therefore recommended that there should be a comprehensive, self-contained set of rules for fatal accident inquiries (paragraph 10.26).

The deliberate intention of the Scottih Government is therefore that sufficient powers should be provided so that a complete and bespoke set of rules for fatal accident inquiries as envisaged by Lord Cullen in his Review may be drafted. Section 34 of the Bill is not therefore simply a replacement for section 7 of the 1976 Act. Therefore the Scottish Government firmly considers that the 2014 Act offers a much more relevant precedent.

The Scottish Government believes that the new inquiry rules are going to be at least as significant as the new Act itself in the provision of a reformed and modernised system of fatal accident inquiries in Scotland and so it would be unfortunate to restrict the scope of provision in the rules by precluding possibly creative, radical and novel initiatives being included in them either in the near future, or when they are revised thereafter. There might also be

wider future changes to civil practice and procedure that the Scottish Civil Justice Council would wish to see take effect in all civil proceedings, and in that regard the power to make rules for fatal accident inquiries should not afford less flexibility than the default power to make acts of sederunt in the 2014 Act.

The Scottish Government continues to believe that the approach proposed allows for maximum flexibility to deliver Lord Cullen's recommendation concerning inquiry rules. The broadening of rule-making powers is deliberate in this regard whilst remaining limited by the main purpose of the power.

Section 34(1)(b)

The Scottish Government does not agree with the Committee that to change the reference in section 34(1)(b) to "inquiry proceedings" rather than the "inquiry" would have the effect of narrowing the limit of the ancillary power. In terms of the Bill, the "inquiry" is the substantive hearing itself (see section 1(5)(a)). The "inquiry proceedings" are any proceedings related to the inquiry, including any preliminary hearing (see section 10(2)(a)). To amend section 34(1)(b) to refer to "inquiry proceedings" may actually have the effect of widening the scope of the provision. The Scottish Government is content with the provision as it stands.

The Scottish Government would suggest that a good example of a matter incidental or ancillary to an inquiry on which rules will have to be made under section 34(1)(b) will be the giving of responses to the Scottish Courts and Tribunals Service (SCTS) under section 27(1) to (4) of the Bill and the publication of those responses by SCTS under section 27(5). Once a sheriff has made his or her determination under section 25 of the Bill, the sheriff is *functus officio* and the inquiry is over. The dissemination of the sheriff's determination, which includes any recommendations, is a matter for SCTS under section 26, and the actions which SCTS are required to carry out are clearly ancillary to the inquiry.

Other creative and novel initiatives may of course suggest themselves in the future whereby the system of fatal accident inquiries may be improved by the making of rules under section 34(1)(b). The Scottish Civil Justice Council is charged with keeping the overall system of civil justice under review and will be well placed to consider this matter in the years ahead.

As the Government noted in its original response to the Committee, the power in section 34(1)(b) is limited by the implicit requirement that there must be material connection to the fatal accident inquiry. It would not be sufficient to rely on section 34(1)(a) only because there is a need for rules about matters that are not strictly matters of practice or procedure and which are not part of the inquiry itself.

Parliamentary procedure

The power to make acts of sederunt relates to the regulation of the practice and procedure of the the sheriff court, when sitting as a fatal accident inquiry, and to the regulation of matters incidental or ancillary to such proceedings. The Scottish Government considers that these powers extend to regulating the courts' processes and the requirement of fatal accident inquiries rather than the substantive rights of the parties. These are properly matters for the courts. In order to preserve the courts from political interference and in accordance with the principle of separation of powers, such acts of sederunt are not presently subject to Parliamentary procedure and the Government considers that this remains appropriate for the act of sederunt-making powers introduced in section 34 of the Bill.

We hope that the Committee will find the information provided helpful.

ANNEX C

PATRICIA FERGUSON'S MEMBER'S INQUIRIES INTO DEATHS (SCOTLAND) BILL

SCOTTISH GOVERNMENT RESPONSE TO THE JUSTICE COMMITTEE'S STAGE 1 REPORT

I note that the main focus of the Committee's Report is on proposals in Patricia Ferguson's Bill which diverge from the Government Bill. I welcome the Committee's endorsement of the Government's Bill as the vehicle that the Parliament should take forward to Stage 2 for reform and improvement of FAI legislation. In that context I have the following comments on the Committee's Report on Ms Ferguson's Bill.

Paragraph 11
The Committee has suggested that an FAI is "generally considered to be" an inquisitorial process where the sheriff takes an active role in establishing the facts surrounding the death, and whether lessons can be learned, as opposed to criminal and civil proceedings which are considered to be adversarial and are concerned with apportioning blame or ascertaining whether a crime has been committed.

There is no doubt that an FAI is an inquisitorial process as required by the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. The Scottish Government's Bill makes it clear that this should continue to be the case. The Scottish Government believes that aspects of the member's bill will actually go against this aim, particularly the making of sheriffs' recommendations legally binding.

Initial early hearing

Paragraph 18
The Committee has noted that the Scottish Government's Bill also did not take forward the recommendations that an initial early hearing should be held and that the Scottish Government should take responsibility for publicising responses to sheriff's recommendations.

However, the Committee noted in its Stage 1 Report on the Scottish Government's Bill (at paragraph 144) that it was not convinced that early initial hearings were necessary, given the commitment by the Solicitor General to produce a Charter.

Lord Cullen gave evidence in support of early hearings before a sheriff in relation to deaths where further investigations are required by COPFS in order to establish whether there ought to be a criminal prosecution and/or whether an FAI should be held. These early hearings would be a mechanism to keep families informed of progress in the investigation and the expected timescales for an FAI. The suggestion was opposed by COPFS and the Sheriffs' Association who confirmed that the sheriff has no locus in an FAI until an application to hold an inquiry has been made.

As a workable compromise, the Solicitor General has offered that the fiscal will contact the bereaved family within three months of a death being reported to COPFS and offer a personal meeting with the family within 14 days. This commitment has been included in COPFS' draft Charter as part of the timescales for updating families during a death investigation.

COPFS investigates about half of the 11,000 deaths which are reported to it. An average of only 50-60 cases per annum proceed to an FAI. To have an early hearing in every case that may lead to a potential FAI would potentially result in thousands of judicial hearings, which is not efficient use of judicial and court time. This would be a disproportionate and inappropriate way of keeping families informed and ensuring that the death investigation is kept on track. The Scottish Government (and the Sheriffs' Association) does not believe that the sheriff should become involved in case management until an FAI is actually instigated.

Publicising responses to sheriff's recommendations

Lord Cullen's proposal that the Scottish Government should take responsibility for publicising responses to sheriffs' recommendations was recommended when the Scottish Court Service (as it was then) was still part of the Scottish Government. Since Lord Cullen's Report was published, SCTS (as it is now) became an independent body corporate responsible for providing administrative support to the Scottish courts and tribunals and to the judiciary of courts.

The Scottish Government very strongly agrees that lessons from FAIs should be learnt and acted upon, but, as noted in the Government's response to the Committee's Stage 1 Report on the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill, does not believe that its involvement would be the best or even the most appropriate way to achieve this aim. Furthermore, the Committee's Stage 1 Report on the Government's Bill (at page 36) said that there "was general agreement that sheriffs' recommendations should be published alongside the responses from those to whom they are directed". As sheriffs' determinations which include their recommendations are published on the SCTS website it is therefore logical that responses to recommendations should be published there also.

Tom Marshall of the Society of Solicitor Advocates gave evidence to the Committee that using the SCTS website *"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".*

Eric McQueen, the Chief Executive of SCTS, agreed: *"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".*

Charter

Paragraph 22
The Committee recommended that the Solicitor General make available a draft Charter in advance of Stage 2 of the Government's Bill. The draft Charter was in fact shared with the Justice Committee and Patricia Ferguson with comments invited by mid-August as part of COPFS' consultation.

Paragraph 26
The Committee has noted that Patricia Ferguson's consultation on her legislative proposals received 30 responses. It is worth noting that no fewer than eight of the responses were from individual Labour MSPs, while two further responses were received from Thompsons, Solicitors, who have supported Ms Ferguson in bringing forward her Bill and from the STUC, who are advised by Thompsons. While all those responses are from parties entitled to

contribute to the consultation and there is nothing improper at work, there may be a risk that this may exaggerate support for measures in the Bill.

Mandatory Inquiries

Deaths resulting from industrial disease or work-related exposure

In relation to Patricia Ferguson's proposal that FAIs into deaths caused by industrial disease or work-related exposure should result in mandatory FAIs, which may or may not be sought by the family, it is not clear what other purpose would be served by an FAI when the exposure causing the fatality may have been decades ago, at a work place that no longer exists or that is outside Scotland, and where in any event the risks and dangers of that exposure are now fully known and understood.

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

However, I want to stress that, as the Solicitor General said in evidence to the Committee, where new industrial processes or diseases are identified, this would be exactly the situation where there should be discretion as to whether to hold an FAI depending on the levels of public concern and the need to air these concerns. I note that neither Lord Cullen nor the Health and Safety Executive supported FAIs into industrial diseases and Tom Marshall, of Thompsons Solicitors and President of the Society of Solicitor Advocates, said: *"It is unrealistic to have a mandatory inquiry in every case of industrial disease"*.

Paragraph 35
I note that the Financial Memorandum prepared by Ms Ferguson, with advice from Thompson's Solicitors[4], on her Bill estimates that there will be no more than one or two additional FAIs every five years compared with 2014/15 figures as a consequence of the proposed extension of the mandatory category of FAI to deaths as a result of industrial disease or exposure to hazardous substances.

Ms Ferguson's low estimates are on the basis that the system would be mandatory with a power for the Lord Advocate to "opt out", which she believes would happen in the vast majority, if indeed not virtually all, cases.

I firmly believe that it is pointless to make all such cases mandatory if the expectation is that the Lord Advocate would dispense with the FAI in virtually all cases. Such inquiries should be held on a discretionary basis, particularly where holding an FAI into a death caused by a disease whose dangers are well known and understood would not add to stakeholders' knowledge.

HSE confirmed that there have been around 185 deaths from mesothelioma alone each year in Scotland over the last 5 years (representing 7.5% of the total for UK). Based on HSE's projected statistics[5], there could be around 180 deaths from mesothelioma per year in Scotland between the years 2016-2019 followed by a gradual reduction to 140 deaths by 2030. According to HSE, there have been 12,000 deaths per year across the UK due to work-related lung diseases from past workplace conditions, which is approximately 900

[4] Inquiries Into Deaths (Scotland) Bill SP Bill 71. Financial Memorandum. paragraph 31
[5] HSE Annual projections of mesothelioma deaths in Great Britain at ages 20-89 www.hse.gov.uk/research/rrhtm/rr728.htm

deaths per year in Scotland. If only a tiny fraction of these cases were to trigger mandatory FAIs, it seems likely that the current figure of 50-60 FAIs per annum would be increased dramatically.

It would be very difficult for the Lord Advocate to decline to hold an inquiry which would otherwise be mandatory in law unless the circumstances of the death have been investigated in other proceedings, as is sometimes the case at present in relation to criminal proceedings. The introduction of such a system would also raise families' expectations and would likely result in the bereaved family (and their legal representatives) seeking to challenge decisions to dispense with an inquiry which would otherwise be mandatory as they would feel that they were entitled by law to a mandatory inquiry. This could also result in a rise in the judicial review of such decisions. Legal representatives might press for mandatory FAIs to proceed in order to seek to try to establish grounds for civil proceedings.

Ms Ferguson has, however, indicated that her principal concern is where a new industrial disease or a new industrial process such as fracking may lead to deaths. The system of discretionary FAIs is perfectly adequate to pick up cases where death has resulted from new or controversial working practices which cause public concern. We therefore believe that Ms Ferguson's proposal would result in many more FAIs than she anticipates and would as a result have a significant financial impact.

The Solicitor General highlighted during her evidence that, where new industrial processes or diseases are identified, the Lord Advocate would already have the discretion to hold an FAI where a death had occurred. She said:

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

I believe that this should provide reassurance to the Committee, Parliament and the public that a discretionary FAI would be likely to be held into a death from a new industrial disease or process.

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

This was not publicly supported by the Justice Committee in its Stage 1 Report on the Government's Bill and no recommendation was made by the Committee to consider this category further (see page 18-19 of report).

The Scottish Government will argue before the Parliament that its Bill strikes the right approach for deaths of this nature and will accordingly seek the Parliament's endorsement of this principle.

Paragraph 42
Lord Cullen recommended that mandatory FAIs should also be triggered where a child living in a residential establishment or someone subject to compulsory detention by a public authority dies. The response to the Committee's Report on the Scottish Government's Bill in

Annex A explains why the Scottish Government does not propose to implement these recommendations.

Paragraph 43
I note that Ms Ferguson's Bill would make it mandatory for an FAI to be held in cases of the death of a child required to be kept or detained in secure accommodation. This is exactly what the Scottish Government's Bill also requires in this regard.

Paragraph 44
The Financial Memorandum for Ms Ferguson's Bill suggests that the impact of the extension to include patients receiving compulsory mental health treatment regardless of whether they are detained in hospital would result in no more than one or two additional FAIs per year.

As noted in Annex A, the Mental Welfare Commission for Scotland (MWCS) highlighted research into deaths under compulsory treatment orders confirmed that there were 78 such deaths in 2012/13 and 53 were from natural causes. This does not include patients receiving treatment on a voluntary basis so the number of FAIs could be over 25 (the number of unknown or non-natural cause deaths), which is significantly higher than the two additional FAIs per year estimated in the Financial Memorandum.

Ms Ferguson's response to the Government's concerns was to say that the Lord Advocate would have discretion not hold an FAI when the death is confirmed as being natural cause. However the figures above show that even non-natural cause deaths could effectively increase the number of FAIs by 50% per year, rather than the one or two she has estimated.

I entirely agree with the Committee's observation that, if the scope of mandatory FAIs is extended to include deaths of those detained under the mental health legislation, the numbers of inquires will rise significantly and the financial impact would be significant.

Paragraph 48
I am surprised that the Committee has chosen to mention that some witnesses questioned whether the procedural requirements under the current system for investigating the death of someone subject to a compulsory detention order ensured human rights compliance.

Neither the Scottish Human Rights Commission nor the Committee (in its Stage 1 Report on the Government's Bill) suggested that the FAI system was not compliant with ECHR. It is not necessary to hold an FAI in each and every case. Lord Phillips said in R (L) v Secretary of State for Justice [2009] AC 588 at para 31:

"The duty to investigate imposed by article 2 covers a very wide spectrum. Different circumstances will trigger the need for different types of investigation with different characteristics. The Strasbourg court has emphasised the need for flexibility and the fact that it is for the individual state to decide how to give effect to the positive obligations imposed by article 2."

Both the Scottish Government and the Presiding Officer have certified the Bill's competence. The Solicitor General's subsequent evidence that the Lord Advocate's discretion to hold a fatal accident inquiry is the final safeguard for Article 2 of ECHR should provide reassurance to the Committee.

Paragraphs 49 and 52
The Committee has drawn attention to concern about how the deaths of those detained under mental health legislation were investigated in practice with the current system being

described as confusing and having gaps. It concluded in its report on the Government's Bill that further consideration be given to extending that Bill to make it mandatory that a fatal accident inquiry be held following the death of a person detained under mental health legislation and that consideration also be given to rationalising and formalising the current investigatory processes.

I note that the Committee's Report on Ms Ferguson's Bill makes no mention of section 37 of the Mental Heath (Scotland) Act 2015 which requires Ministers carry out a review (within three years) of the arrangements for investigating the deaths of patients who at the time of the death were detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedures (Scotland) Act 1995, or who were admitted voluntarily for treatment for a mental disorder.

As noted in the Government's response to the Committee's Stage 1 Report on the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill, in relation to the Committee's Report on the Scottish Government's Bill, I do not believe that it would be appropriate or sensible to legislate to extend the mandatory category in relation to deaths of mental health patients in advance of the work of that review.

Paragraph 53
As also noted in the Government's response to the Committee's Stage 1 Report on the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill, I do not believe that it would be appropriate or sensible to extend the mandatory category of FAIs to include the death of a child who is looked after when a national Child Death Review System is in prospect.

This proposal goes beyond Lord Cullen's recommendation and would include some children living at home or with family, not just those in care, as the definition of Looked After Children is very wide.

I continue to believe that no other change should be made in relation to FAIs in relation to deaths of children other than the proposed extension of the mandatory category of FAIs to deaths of children in secure accommodation (particularly in advance of the Review referred to above) because:

- The Scottish Government already provides for deaths of Looked After Children through the reporting requirements of the Looked After Children (Scotland) Regulations 2009, which require local authorities to notify the Scottish Ministers and the Care Inspectorate of a death within one working day.
- Deaths of children in residential establishments are investigated and reviewed by the Care Inspectorate and many (half) are as a result of health issues. It is difficult to see how the public interest would be served by having a FAI for every such case. The Care Inspectorate identifies any lessons to be learned and makes recommendations for review of legislation, policy or guidance.
- COPFS liaise with and refer to Care Inspectorate reports to inform its decisions on whether to hold an FAI
- If there is public interest in having an FAI, the Lord Advocate can hold a discretionary FAI.

Time Limits

Paragraph 58
I note that Patricia Ferguson's Bill would create specific time limits in which an FAI would have to be held. She has proposed that in situations where there is no intention to bring

criminal proceedings (or other forms of inquiry), an FAI should take place within a year of the death. The Lord Advocate would have six months from the death to notify the relatives as to whether the Lord Advocate intends to hold an FAI. The Lord Advocate would then have an additional three months to apply to the sheriff and the sheriff would have a further three months to hold a preliminary hearing.

Lord Cullen did not recommend the introduction of statutory timesclales for FAIs due to the complexity and diversity of FAIs and 80% of the respondents to the Government's consultation agreed with that view. Imposing artificial deadlines on FAIs and death investigations carries the risk that the investigation may not be as thorough as it should be and the causes of the accident may not be adequately established. That cannot be what anyone wants, particularly bereaved families.

There are very often legitimate and unavoidable reasons for delays between the date of death and the beginning of an FAI

- the need to wait for the outcome of other investigations by bodies like the Health and Safety Executive or the Air Accident Investigation Branch;
- the possible need to obtain expert advice;
- the need to consider whether criminal proceedings are appropriate; and, above all,
- the overriding necessity of conducting death investigations thoroughly – this factor is of particular relevance in relation to the complexity of some investigations, especially those involving medical cases and of course helicopter crashes.

Family Involvement and Information

Paragraph 66
The importance of keeping the family informed of important developments during a death investigation is one of the reasons COPFS undertook to provide a Charter, which will include commitments in relation to timescales and decisions on whether to hold an FAI.

Paragraph 69
I am pleased to confirm that the Scottish Government is minded to support an amendment at Stage 2 with a provision to underpin the Charter and other guidance on death investigations thus providing a statutory basis, as suggested by Ms Ferguson. I am grateful to Patricia Ferguson for raising the possibility of statutory underpinning.

Paragraph 71
The Charter proposed by COPFS is intended to make the process more understandable and to keep the family fully apprised of progress with the death investigation. While I sympathised with the Committee's desire to support families, I cannot, however, agree with the Committee that it would be appropriate in all circumstances that families should be notified each step of the way about any and all decisions relating to when an inquiry will be held, the reasons behind decisions and the scope of any inquiry as it progresses.

Some 5500 death investigations are conducted by COPFS per annum. Some of these will result in criminal proceedings, some will result in no further action and 50-60 will result in FAIs. If COPFS were to be obliged to notify families of each and every decision taken during the course of a death investigation, with an explanation of the reasons behind each decision, then FAIs and death investigations more generally will undoubtedly take longer to bring to a conclusion whether that involves court proceedings or not. Any delays will become worse, not better.

Paragraph 72
While the Scottish Government agrees that FAIs should proceed without unnecessary delay, this is not simply to provide families with the answers they are seeking albeit we recognise that this is of great importance to the bereaved. FAIs are, however, not for held the benefit of bereaved families alone. So, while we appreciate that families wish to find out what happened to their loved ones, I reiterate FAIs are principally held in the public interest to determine the circumstances of a death and to establish whether precautions may be taken which might prevent deaths in similar circumstances in the future.

This requires the procurator fiscal to carry out a proper and thorough investigation. In cases where an FAI is not mandatory, a decision must be taken on whether the public interest demands that an FAI should be held. The Solicitor General did confirm in her evidence that the family interest is part of the public interest, however the family interest alone cannot drive the process including timescales.

Paragraph 74
The Charter will outline what families can expect from the COPFS in terms of timings of investigations and decision-making and I agree that this will help address the impact of delays on families of the bereaved more effectively than imposing statutory deadlines.

Patricia Ferguson was invited to provide comments on the draft Charter as part of COPFS' consultation over the summer as suggested by the Committee.

Determinations

Paragraph 80
I welcome Ms Ferguson's argument[6] that an FAI determination should be inadmissible in evidence and should not be founded on in other judicial proceedings. This is what the Government's Bill provides. The Scottish Government entirely agrees that this is an essential element of the distinction between, on the one hand, the fact-finding inquisitorial nature of the FAI with the sheriff empowered to make recommendations and, on the other, the fault-finding, adversarial nature of other legal proceedings. It is not the purpose of the FAI to establish liability for negligent actions. As Ms Ferguson has suggested, if liability arises from the death, then a civil case is the forum where these matters are examined.

This statement of principle is, however, undermined by many other provisions in Ms Ferguson's Bill, particularly in relation to making sheriffs' recommendations enforceable with an appeal process. The suggestion that an FAI might be held before a specialist personal injury court is another example. Personal injury actions are adversarial proceedings which seek to establish negligence as grounds for the payment of damages as redress. FAIs are inquisitorial actions which do not apportion blame or guilt and are thus a completely different legal specialism.

Paragraph 81
I note that under Ms Ferguson's Bill, warning notices would be sent to a person or body who had been criticised during the FAI or might be criticised in the sheriff's determination. Warning notices are sent to participants at public inquiries under the Inquiries Act 2005 who may be criticised in an inquiry's final report. They are currently the subject of severe criticism in relation to the Chilcott Inquiry, since they are blamed for significantly lengthening those proceedings and delaying the publication of Sir John Chilcott's final report.

[6] Inquiries Into Deaths (Scotland) Bill SP Bill 71. Explanatory Notes page 16

There is no tradition of issuing warning letters in FAI proceedings (or coroners' inquests for that matter) and the Scottish Government fears that if such a procedure was introduced into the FAI process this would have the result of lengthing FAIs and delaying the sheriff's determination. Bereaved families would therefore have to wait longer to hear the sheriff's conclusions.

As FAIs are inquisitorial judicial inquiries which do not apportion guilt or blame in the criminal or civil sense, it would in any case be inappropriate to introduce a system of warning letters since the sheriff will simply state the circumstances of death and make recommendations as to how deaths in similar circumstances may be avoided in the future.

Paragraph 91
I welcome the statement from the Justice Committee that it has not been persuaded that the FAI system would be improved by giving sheriffs the power to make their recommendations legally binding. This risks undermining the inquisitorial (as opposed to adversarial) nature of the current system, which the Scottish Government sees as key to helping ascertain the circumstances of a death in an objective manner.

The Faculy of Advocates, responding to Ms Ferguson's consultation, commented that *"We think certain aspects of the proposed Bill have the potential to encourage FAIs to become adversarial in nature as opposed to inquisitorial. Other unintended and unwelcome consequences…are the increase in the length, complexity and additional expense of FAIs, and potential for injustice arising from the provisions relating to the enforcing of recommendations."*

Paragraph 97
I entirely agree with the Committee's observation that the judicial review process is the appropriate mechanism for questioning the inquiry process rather than a time-consuming and expensive appeals process which is predicated on recommendations becoming legally enforceable. Sheriffs' recommendations do not bestow rights or obligations on anyone and thus cannot become legally enforceable.

Paragraph 105
I note that the Finance Committee issued a call for evidence on the Financial Memorandum for Ms Ferguson's Bill which closed on 21 August. That Committee received only eight responses and agreed not to undertake any further work or to report on the Financial Memorandum.

Key stakeholders, including COPFS and SCTS, were not aware of this call for evidence and so did not respond. SCTS have complained to the Committee that they were not made aware of this call for evidence on proposals which would have a significant impact on the services provided by SCTS. We understand that they have concerns about the estimates of number of FAIs contained in the Memorandum. The Scottish Government's views of these estimates are outlined above.