PE1745/A
Petitioner submission of 17 October 2019

I would like to bring the following points to the attention of the Committee.

(1) I received a letter from Lord Cullen, dated 12 March 2019, making it clear that, as far as he is aware, Judicial Review is the only legal mechanism open to someone who wants to challenge a decision by the Lord Advocate to not have a Fatal Accident Inquiry.

(2) Lord Cullen's oral evidence to the Justice Committee on 5th May 2015 (see Annexe A). His statement reflects the comments made in his letter to me, but more importantly the fact that the successful outcome of a Judicial Review does not guarantee a Fatal Accident Inquiry. In other words, a person could spend tens of thousands of pounds, win the case, but have nothing to show for it other than 'bragging rights'. That's why the statutory right for an FAI is most important.

(2) Judicial Review costs are prohibitive and beyond the financial means of the average person. This acts as a barrier in favour of the Crown Office.

(3) From experience, I believe that the Family Charter is ineffective as a means of redress. It is a form of self-regulation with the Crown Office reluctant to reverse the original decision. Looks good on paper, but has no teeth.

(4) In England and Wales, a senior coroner who is made aware that the body of a deceased person is within his/her area must, as soon as practicable, conduct an investigation into the person's death if (a) the deceased died a violent or unnatural death, (b) the cause of death is unknown, or (c) the deceased died while in custody or otherwise in state detention. It is not left to the Chief Coroner (Lord Advocate equivalent) to decided which deaths will be subjected to an inquest.

(5) 'Not in the public interest to hold an FAI' is a vague expression used by the Crown office.

During the 2015 Justice Committee review of the FAI Act the Convener afforded me an opportunity to present a statement in person, which I believe proved most effected in that it resulted in an amendment to the act. I respectfully ask that the Convener of the Petitions committee be approach with a view to permitting me to make an oral statement, based on a recent case study. Through this statement I hope to demonstrate the difficulties and failings associated with the current system.

Government and now form part of the bill, but the idea is simply that those children are in the protection of others and that, if something happens while they are being protected, it is right and proper that there should be an FAI. I appreciate that, as has been said by the Government, it would open up a wide range of possible situations, but I have said what I can say in my report and I cannot really add to that.

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

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

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

Lord Cullen: Yes, I accept that.

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

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

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

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

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

Lord Cullen: I suppose that, technically, it could be challenged through judicial review. That is technically possible, but there would have to an underlying legal flaw and, if reasons are given, those reasons might of themselves open up the way to judicial review.

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

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

John Finnie: Thank you very much, Lord Cullen.

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

Lord Cullen: The general answer to that is that it would not be wise for a fatal accident inquiry to start before the conclusion of criminal proceedings. I appreciate that Ms Ferguson has made proposals for time limits, and that they include the possibility of an FAI opening only to be adjourned. My problem with that idea concerns how much could usefully be achieved during that initial phase, because even an explanation of how the deceased came to die might be relevant to the criminal prosecution. There is always a danger that whatever is said could create a problem for an on-going criminal prosecution, so it is better to have the criminal proceedings finished.

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

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

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