



# Scottish Police Federation

5 Woodside Place Glasgow G3 7QF

## JCC Circular 12 of 2015

Ref: CS/LS

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Dear Colleague

### **Inquiries into Fatal Accidents & Sudden Deaths etc (S) Bill – Consultation**

I refer to the above and attach herewith the relevant documents for your information.

Please submit any comments/observations you may have to your local federation office by **Monday 20 April 2015**.

Yours sincerely

**Calum Steele**  
**General Secretary**

# Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill [AS INTRODUCED]

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**ACCOMPANYING DOCUMENTS**

**Explanatory Notes, together with other accompanying documents, are printed separately as SP Bill 63-EN. A Policy Memorandum is printed separately as SP Bill 63-PM.**

**Inquiries into Fatal Accidents and Sudden  
Deaths etc. (Scotland) Bill**  
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision for the holding of public inquiries in respect of certain deaths.

*Inquiries into certain deaths*

**1 Inquiries under this Act**

- 5 (1) Where an inquiry is to be held into the death of a person in accordance with sections 2 to 7, the procurator fiscal must—
- (a) investigate the circumstances of the death, and
  - (b) arrange for the inquiry to be held.
- (2) An inquiry is to be conducted by a sheriff.
- 10 (3) The purpose of an inquiry is to—
- (a) establish the circumstances of the death, and
  - (b) consider what steps (if any) might be taken to prevent other deaths in similar circumstances.
- (4) But it is not the purpose of an inquiry to establish civil or criminal liability.
- 15 (5) In this Act, unless the context requires otherwise—
- (a) “inquiry” means an inquiry held, or to be held, under this Act,
  - (b) references to a “sheriff” in relation to an inquiry are to a sheriff of the sheriffdom in which the inquiry is, or is to be, held.

*Inquiries into deaths occurring in Scotland*

20 **2 Mandatory inquiries**

- (1) An inquiry is to be held into the death of a person which—
- (a) occurred in Scotland, and
  - (b) is within subsection (3) or (4).

- (2) Subsection (1) is subject to section 3.
- (3) The death of a person is within this subsection if the death was the result of an accident which occurred—
- (a) in Scotland, and
- (b) while the person was acting in the course of the person’s employment or occupation.
- (4) The death of a person is within this subsection if, at the time of death, the person was—
- (a) in legal custody, or
- (b) a child required to be kept or detained in secure accommodation.
- (5) For the purposes of subsection (4)(a), a person is in legal custody if the person is—
- (a) required to be imprisoned or detained in a penal institution,
- (b) in police custody, within the meaning of section 56 of the Criminal Justice (Scotland) Act 2015,
- (c) otherwise held in custody on court premises,
- (d) required to be detained in service custody premises.
- (6) For the purposes of subsections (4)(b) and (5)(a) and (d), it does not matter whether the death occurred in secure accommodation, a penal institution or, as the case may be, service custody premises.
- (7) In this section—
- “penal institution” means any—
- (a) prison (including a legalised police cell within the meaning of section 14(1) of the Prisons (Scotland) Act 1989), other than a naval, military or air force prison,
- (b) remand centre, within the meaning of section 19(1)(a) of that Act,
- (c) young offenders institution, within the meaning of section 19(1)(b) of that Act,
- “secure accommodation” means accommodation provided in a residential establishment, approved in accordance with regulations made under section 78(2) of the Public Services Reform (Scotland) Act 2010, for the purpose of restricting the liberty of children,
- “service custody premises” has the meaning given by section 300(7) of the Armed Forces Act 2006.

### **3 Mandatory inquiries: exceptions**

- (1) The Lord Advocate may decide that an inquiry is not to be held into the death of a person within section 2(3) or (4) if satisfied that the circumstances of the death have been sufficiently established during the course of proceedings of a kind mentioned in subsection (2).
- (2) The proceedings referred to in subsection (1) are—
- (a) criminal proceedings,
- (b) an inquiry under section 17(2) of the Gas Act 1965 (accidents),

- (c) an inquiry under section 14(2A) of the Health and Safety at Work etc. Act 1974 (power of the Health and Safety Executive to direct investigations and inquiries),
- (d) an inquiry under section 1 of the Inquiries Act 2005 (power to establish inquiry),
- (e) an inquiry under section 85(1) of the Energy Act 2013 (inquiries).

5 (3) But subsection (1) does not apply if—

- (a) at the time of death, the person was required to be detained in service custody premises, and
- (b) the proceedings referred to in that subsection are an inquiry under section 1 of the Inquiries Act 2005.

10 **4 Discretionary inquiries**

(1) An inquiry is to be held into the death of a person which occurred in Scotland if the Lord Advocate—

(a) considers that the death—

(i) was sudden, suspicious or unexplained, or

15 (ii) occurred in circumstances giving rise to serious public concern, and

(b) decides that it is in the public interest for an inquiry to be held into the circumstances of the death.

(2) Subsection (1) does not apply to a death within section 2(3) or (4).

**5 Certain deaths and accidents to be treated as occurring in Scotland**

20 (1) For the purposes of sections 2 and 4, the death of a person, or an accident, is to be treated as having occurred in Scotland if it occurred—

(a) in connection with an activity falling within section 11(2) of the Petroleum Act 1998 (application of civil law to offshore activities), and

(b) in a relevant area.

25 (2) In subsection (1)(b), “relevant area” means an area in respect of which it is provided by Order in Council under section 11(1) of the Petroleum Act 1998 that questions arising out of acts or omissions taking place in the area are to be determined in accordance with the law in force in Scotland.

*Inquiries into deaths occurring abroad*

30 **6 Inquiries into deaths occurring abroad: general**

(1) Subsection (3) applies to the death of a person if—

(a) the death occurred outwith the United Kingdom,

(b) at the time of death, the person was ordinarily resident in Scotland, and

(c) the person’s body has been brought to Scotland.

35 (2) But that subsection does not apply to the death of a person within section 12(2) or (3) of the Coroners and Justice Act 2009 (investigation in Scotland of deaths of service personnel abroad).

(3) An inquiry is to be held into a death to which this subsection applies if the Lord Advocate—

(a) considers that the death—

(i) was sudden, suspicious or unexplained, or

(ii) occurred in circumstances giving rise to serious public concern,

(b) considers that the circumstances of the death have not been sufficiently established in the course of an investigation in relation to the death,

(c) considers that there is a real prospect that those circumstances would be sufficiently established in an inquiry, and

(d) decides that it is in the public interest for an inquiry to be held into the circumstances of the death.

## **7 Inquiries into deaths occurring abroad: service personnel**

(1) An inquiry is to be held into the death of a person if—

(a) the Lord Advocate is notified in relation to the death under section 12(4) or (5) of the Coroners and Justice Act 2009 (investigation in Scotland of deaths of service personnel abroad),

(b) the death is within subsection (2) or (3), and

(c) the Lord Advocate—

(i) decides that it is in the public interest for an inquiry to be held into the circumstances of the death, and

(ii) does not reverse that decision.

(2) The death of a person is within this subsection if the person was, at the time of death, in custody in circumstances analogous to legal custody (as construed by reference to section 2(5)).

(3) The death of a person is within this subsection if the Lord Advocate considers that the death—

(a) was sudden, suspicious or unexplained, or

(b) occurred in circumstances giving rise to serious public concern.

(4) But this section does not apply to a death within subsection (2) if the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established in the course of any criminal proceedings against any person in respect of the death.

### *Reasons where inquiry not held*

## **8 Reasons for decision not to hold an inquiry**

Where it is decided that an inquiry is not to be held into the death of a person (“A”), the Lord Advocate must give reasons in writing if requested to do so by—

(a) A’s spouse or civil partner at the time of A’s death,

(b) a person living with A as if married to A at the time of A’s death, or

(c) A’s nearest known relative if, at the time of A’s death, A—

(i) did not have a spouse or civil partner, and

- (ii) was not living with a person as if married to the person.

*Procurator fiscal's investigation*

**9 Citation of witnesses for precognition**

- 5 (1) The procurator fiscal may cite a person to attend for precognition in connection with an investigation under section 1(1)(a).
- (2) This section is sufficient warrant for such citation.
- (3) Subsection (4) applies where a person cited under subsection (1)—
  - 10 (a) having been given reasonable notice in the citation, and without reasonable excuse, fails to attend for precognition at the time and place mentioned in the citation, or
  - (b) does so attend but refuses to give information which is—
    - (i) within the person's knowledge, and
    - (ii) relevant to the investigation.
- 15 (4) The sheriff may, on the application of the procurator fiscal, make an order requiring the person to attend for precognition or, as the case may be, give the information at a time and place specified in the order.
- (5) A person who fails to comply with an order under subsection (4) commits an offence.
- 20 (6) A person who commits an offence under subsection (5) is liable on summary conviction to imprisonment for a term not exceeding 21 days or a fine not exceeding level 3 on the standard scale (or both).

*Participants*

**10 Persons who may participate in the inquiry**

- 25 (1) The following persons may participate in inquiry proceedings in relation to the death of a person ("A")—
  - (a) A's spouse or civil partner at the time of A's death,
  - (b) a person living with A as if married to A at the time of A's death,
  - (c) A's nearest known relative if, at the time of A's death, A—
    - (i) did not have a spouse or civil partner, and
    - (ii) was not living with a person as if married to the person,
  - 30 (d) where the death is within section 2(3)—
    - (i) A's employer, if A was an employee,
    - (ii) an inspector appointed under section 19 of the Health and Safety at Work etc. Act 1974 (appointment of inspectors),
  - (e) any other person who the sheriff is satisfied has an interest in the inquiry.
- 35 (2) In this Act—
  - (a) "inquiry proceedings" means any proceedings under this Act in relation to an inquiry,

- (b) references to a participant in an inquiry are references to a person who participates in the inquiry proceedings by virtue of subsection (1).

*Location*

**11 Places at which inquiries may be held**

- 5 (1) The Scottish Ministers may by regulations designate places at which a sheriff court may be held for the purposes of this Act (in addition to the places designated by virtue of the Courts Reform (Scotland) Act 2014 for the holding of sheriff courts).
- (2) The Scottish Ministers may make regulations under subsection (1) only following the submission of a proposal under subsection (3).
- 10 (3) The Scottish Courts and Tribunals Service (“the SCTS”) may, with the agreement of the Lord President of the Court of Session, submit a proposal to the Scottish Ministers for the making of regulations under subsection (1).
- (4) Before submitting a proposal to the Scottish Ministers, the SCTS must consult such persons as it considers appropriate.
- 15 (5) If, following the submission of a proposal, the Scottish Ministers decide to make regulations, they must have regard to the proposal in deciding what provision to make in the regulations.
- (6) The Scottish Ministers may make regulations under subsection (1) only with the consent of—
- 20 (a) the Lord President, and
- (b) the SCTS.
- (7) Regulations under subsection (1)—
- (a) may make transitional, transitory or saving provision,
- (b) are subject to the affirmative procedure.

**12 Jurisdiction in relation to inquiries**

- 25 (1) Inquiry proceedings may be held in a sheriffdom whether or not there is a connection between the death, or any accident resulting in the death, to which the inquiry relates and the sheriffdom, and a sheriff of the sheriffdom accordingly has jurisdiction in relation to the proceedings.
- 30 (2) The Lord Advocate is, after consulting the Scottish Courts and Tribunals Service, to choose the sheriffdom in which proceedings are to be held.
- (3) But the sheriff may make an order transferring the proceedings to a sheriff of another sheriffdom.
- (4) The sheriff may make an order under subsection (3) only—
- 35 (a) after giving the procurator fiscal and the participants in the inquiry an opportunity to make representations about the proposed transfer, and
- (b) with the consent of—
- (i) the sheriff principal of the sheriffdom of which the sheriff is a sheriff, and
- (ii) the sheriff principal of the sheriffdom to which the sheriff proposes to transfer the proceedings.
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- (5) The sheriff may make such an order—
  - (a) on the sheriff’s own initiative, or
  - (b) on the application of the procurator fiscal or a participant in the inquiry.

*Inquiries into multiple deaths*

5 **13 Inquiry into more than one death**

- (1) A single inquiry may be held into the deaths of more than one person if it appears to the Lord Advocate that the deaths occurred—
  - (a) as a result of the same accident, or
  - (b) otherwise in the same or similar circumstances.

- 10 (2) Where an inquiry is held in relation to the deaths of more than one person, references in this Act to the death to which, or person to whom, the inquiry relates are references to each death to which, or person to whom, the inquiry relates.

*Pre-inquiry procedure*

**14 Initiating the inquiry**

- 15 (1) Where an inquiry is to be held into the death of a person, the procurator fiscal must give the sheriff—
- (a) notice that the inquiry is to be held,
  - (b) a brief account of the circumstances of the death so far as known to the procurator fiscal, and
  - (c) any other information required by an act of sederunt under section 34(1).

- 20 (2) On receiving notice under subsection (1)(a), the sheriff must make an order—
- (a) fixing—
    - (i) a date and place for the holding of a preliminary hearing in accordance with section 15 (if one is to be held), and
    - (ii) a date for the start of the inquiry and the place at which it is to be held, and
  - (b) granting warrant for the procurator fiscal and the participants in the inquiry to cite persons to attend and give evidence at the inquiry.

- 25 (3) But the sheriff need not fix a date for the start of the inquiry (and the place at which it is to be held) in the order if—
- (a) a preliminary hearing is to be held, and
  - (b) the sheriff considers that it is not appropriate to fix the date before that hearing.

- 30 (4) The sheriff may make an order varying a date or place fixed in an order under subsection (2).

- 35 (5) The sheriff must, when fixing a date for the start of the inquiry, have regard to the desirability of holding the inquiry as soon as is reasonably practicable.

**15 Preliminary hearings**

- (1) At least one preliminary hearing is to be held before the start of an inquiry unless the sheriff dispenses with that requirement in accordance with provision made in an act of sederunt under section 34(1).
- 5 (2) Subsection (3) applies where the sheriff dispenses with the requirement to hold a preliminary hearing.
- (3) The sheriff may subsequently make an order—
- (a) for the holding of such a hearing, and
  - (b) fixing the date and place for it to be held.
- 10 (4) Provision is to be made in an act of sederunt under section 34(1) about—
- (a) matters to be dealt with at a preliminary hearing under this Act,
  - (b) things that the procurator fiscal and the participants in the inquiry must do before such a hearing.

**16 Notice of the inquiry**

- 15 (1) After the sheriff makes an order under section 14(2) in relation to an inquiry, the procurator fiscal must give notice to the persons mentioned in subsection (2) of the following matters—
- (a) the fact that the inquiry is to be held, and
  - (b) if fixed in the order—
- 20 (i) the date and place for the holding of the preliminary hearing,
- (ii) the date for the start of the inquiry and the place at which it is to be held.
- (2) The persons referred to in subsection (1) are—
- (a) a person appearing to the procurator fiscal to be entitled to participate in the inquiry under section 10(1)(a) to (d), and
  - 25 (b) any other person specified, or in a category of persons specified, in an act of sederunt under section 34(1).
- (3) The procurator fiscal must also give public notice of the matters specified in subsection (1)(a) and (b).
- (4) Subsection (5) applies where the sheriff makes an order under section 14(4).
- 30 (5) The procurator fiscal must—
- (a) give notice to the persons mentioned in subsection (2) of the new date or, as the case may be, place fixed in the order, and
  - (b) give public notice of that fact.
- (6) Subsection (7) applies where the sheriff makes an order under section 15(3).
- 35 (7) The procurator fiscal must—
- (a) give notice to the persons mentioned in subsection (2) of the following matters—
- (i) the fact that a preliminary hearing is to be held, and
  - (ii) the date and place fixed for the holding of the hearing, and
- (b) give public notice of those matters.

**17 Agreement of facts before an inquiry**

- (1) Provision is to be made in an act of sederunt under section 34(1) about the agreement, by the procurator fiscal and the participants in an inquiry, of any facts of a kind mentioned in subsection (2) before the start of the inquiry.
- 5 (2) The facts referred to in subsection (1) are facts—
- (a) in relation to which the procurator fiscal or a participant intends to bring forward evidence at the inquiry, and
  - (b) which the procurator fiscal or, as the case may be, participant considers are unlikely to be disputed at the inquiry.

*The inquiry***18 The powers of the sheriff**

- (1) The sheriff has all such powers in relation to inquiry proceedings as a sheriff, under the law of Scotland, inherently possesses for the purposes of the discharge of the sheriff's jurisdiction and competence and giving full effect to the sheriff's decisions in civil proceedings.
- 15 (2) Subsection (1) is subject to—
- (a) the other provisions of this Act,
  - (b) provision made in an act of sederunt under section 34(1).

**19 Evidence and witnesses**

- 20 (1) At an inquiry—
- (a) the procurator fiscal must bring forward evidence relating to the circumstances of the death to which the inquiry relates,
  - (b) a participant in the inquiry may bring forward such evidence.
- (2) Without limiting subsection (1), the sheriff may require the procurator fiscal or a participant in the inquiry to bring forward evidence about any matter relating to the circumstances of the death.
- 25 (3) The rules of evidence which apply in relation to civil proceedings in the sheriff court (other than a simple procedure case) apply in relation to an inquiry.
- (4) Subsection (3) is subject to provision made in an act of sederunt under section 34(1).
- 30 (5) The examination of a person at an inquiry does not prevent criminal proceedings being taken against the person.
- (6) A person is not required at an inquiry to answer a question tending to show that the person is guilty of an offence.
- (7) In subsection (3), "simple procedure case" has the same meaning as in section 72(9) of the Courts Reform (Scotland) Act 2014.
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**20 Inquiry to be conducted in public**

- (1) Inquiry proceedings are to be conducted in public.

- (2) But the sheriff may order that such proceedings (or any part of them) are to be conducted in private.
- (3) The sheriff may make an order under subsection (2)—
- (a) on the sheriff’s own initiative, or
- (b) on the application of the procurator fiscal or a participant in the inquiry.

## **21 Publishing restrictions in relation to children**

- (1) Subsection (2) applies where a child is involved in an inquiry.
- (2) The sheriff may order that no person may publish any material by which the child may be identified in connection with the inquiry.
- (3) Such material includes (but is not limited to)—
- (a) the child’s name or address,
- (b) the name of a school attended by the child,
- (c) a picture of the child.
- (4) The sheriff may make an order under subsection (2)—
- (a) on the sheriff’s own initiative, or
- (b) on the application of the procurator fiscal or a participant in the inquiry.
- (5) A person who fails to comply with an order under subsection (2) commits an offence.
- (6) A person who commits an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.
- (7) It is a defence for a person charged with an offence under subsection (5) to show that the person did not know or have reason to believe that the publication of the material would identify the child in connection with the inquiry.
- (8) In this section—
- “material” means anything that is capable of being read, looked at, watched or listened to, either directly or after conversion from data stored in another form,
- “publish” includes in particular—
- (a) to publish in a programme service, as defined by section 201 of the Broadcasting Act 1990,
- (b) to cause to be published.

## **22 Offences by bodies corporate etc.**

- (1) Subsection (2) applies where—
- (a) an offence under section 21(5) has been committed by—
- (i) a body corporate,
- (ii) a Scottish partnership, or
- (iii) an unincorporated association other than a Scottish partnership, and
- (b) it is proved that the offence was committed with the consent or connivance of, or was attributable to neglect on the part of—

- (i) a relevant individual, or
  - (ii) an individual purporting to act in the capacity of a relevant individual.
- (2) The individual (as well as the body corporate, partnership or, as the case may be, association) commits the offence and is liable to be proceeded against and punished accordingly.
- (3) In subsection (1)(b), “relevant individual” means—
  - (a) in relation to a body corporate (other than a limited liability partnership)—
    - (i) a director, manager, secretary or similar officer of the body,
    - (ii) where the affairs of the body are managed by its members, a member,
  - (b) in relation to a limited liability partnership, a member,
  - (c) in relation to a Scottish partnership, a partner,
  - (d) in relation to an unincorporated association other than a Scottish partnership, an individual who is concerned in the management or control of the association.

### **23 Assessors**

- (1) The sheriff may appoint a person (an “assessor”) to assist the sheriff in an inquiry.
- (2) The sheriff may appoint a person as an assessor if the sheriff considers that the person has knowledge and expertise in matters that are relevant to the inquiry.
- (3) The sheriff may make an appointment under subsection (1)—
  - (a) on the sheriff’s own initiative, or
  - (b) on the application of the procurator fiscal or a participant in the inquiry.

### **24 Expenses**

The sheriff may not make any award of expenses in relation to inquiry proceedings.

#### *Findings and recommendations*

### **25 The sheriff’s determination**

- (1) As soon as possible after the conclusion of the evidence and submissions in an inquiry, the sheriff must make a determination setting out—
  - (a) in relation to the death to which the inquiry relates, the sheriff’s findings as to the circumstances mentioned in subsection (2), and
  - (b) such recommendations (if any) as to any of the matters mentioned in subsection (4) as the sheriff considers appropriate.
- (2) The circumstances referred to in subsection (1)(a) are—
  - (a) when and where the death occurred,
  - (b) when and where any accident resulting in the death occurred,
  - (c) the cause or causes of the death,
  - (d) the cause or causes of any accident resulting in the death,
  - (e) any precautions which—

- (i) could reasonably have been taken, and
  - (ii) had they been taken, might realistically have resulted in the death, or any accident resulting in the death, being avoided,
- (f) any defects in any system of working which contributed to the death or any accident resulting in the death,
- (g) any other facts which are relevant to the circumstances of the death.
- (3) For the purposes of subsection (2)(e) and (f), it does not matter whether it was foreseeable before the death or accident that the death or accident might occur—
  - (a) if the precautions were not taken, or
  - (b) as the case may be, as a result of the defects.
- (4) The matters referred to in subsection (1)(b) are—
  - (a) the taking of reasonable precautions,
  - (b) the making of improvements to any system of working,
  - (c) the introduction of a system of working,
  - (d) the taking of any other steps,which might realistically prevent other deaths in similar circumstances.
- (5) A recommendation under subsection (1)(b) may (but need not) be addressed to—
  - (a) a participant in the inquiry,
  - (b) a body or office-holder appearing to the sheriff to have an interest in the prevention of deaths in similar circumstances.
- (6) A determination is not admissible in evidence, and may not be founded on, in any judicial proceedings of any nature.

## **26 Dissemination of the sheriff's determination**

- (1) The Scottish Courts and Tribunals Service (“the SCTS”) must—
  - (a) publish, in such manner as it considers appropriate, each determination made under section 25(1),
  - (b) give a copy of each such determination to—
    - (i) the Lord Advocate,
    - (ii) each participant in the inquiry,
    - (iii) each person to whom a recommendation made in the determination is addressed, and
    - (iv) any other person who the sheriff considers has an interest in a recommendation made in the determination.
- (2) The SCTS must, on request, give the Scottish Ministers, a Minister of the Crown, a department of the Government of the United Kingdom or the Health and Safety Executive a copy of—
  - (a) a determination made under section 25(1),
  - (b) the notice given under section 14(1) in relation to the inquiry to which the determination relates,

- (c) any transcript of the evidence at the inquiry,
  - (d) any report or documentary production used in the inquiry.
- (3) The SCTS must, on payment of the specified fee, give any other person a copy of —
- (a) a determination made under section 25(1),
  - (b) any transcript of the evidence at an inquiry, if the person—
    - (i) makes a request for it within the specified period, and
    - (ii) has an interest in the inquiry.
- (4) In subsection (3), “specified” means specified in an act of sederunt under section 34(1).
- (5) The sheriff may decide in accordance with provision made in an act of sederunt under section 34(1) that part of a determination—
- (a) is not to be given to a person under this section,
  - (b) is to be withheld from publication under this section.
- (6) After the sheriff has made a determination under section 25(1), the procurator fiscal must give the following information to the Registrar General of Births, Deaths and Marriages for Scotland—
- (a) the name and last known address of the person to whose death the determination relates, and
  - (b) the date, place and cause of the death.

## **27 Compliance with sheriff’s recommendations**

- (1) A person to whom a recommendation under section 25(1)(b) is addressed—
- (a) must, if the person was a participant in the inquiry to which the recommendation relates, give the Scottish Courts and Tribunals Service (“the SCTS”) a response in writing,
  - (b) may do so in any other case.
- (2) A response under subsection (1) must set out—
- (a) details of what the respondent has done or proposes to do in response to the recommendation, or
  - (b) if the respondent has not done, and does not intend to do, anything in response to the recommendation, the reasons for that.
- (3) A response under subsection (1)(a) must be given to the SCTS within the period of 8 weeks beginning with the day on which the respondent receives a copy of the determination in which the recommendation is made.
- (4) A person who gives a response to the SCTS under subsection (1) may, at the same time, make representations to the SCTS as to the withholding of part of the response from publication under subsection (5).
- (5) The SCTS must, after considering any representations made under subsection (4), publish, in such manner as it considers appropriate—
- (a) a response, or part of a response, given in accordance with subsection (1),
  - (b) if no response is given in accordance with subsection (1)(a) by the end of the 8 week period mentioned in subsection (3), notice of that fact.

*Further inquiry proceedings***28 Circumstances in which there may be further proceedings**

- (1) Where an inquiry into the death of a person has ended, further inquiry proceedings may be held in relation to the death only in accordance with subsection (2).
- 5 (2) Further inquiry proceedings are to be held in relation to the death if—
- (a) there is new evidence in relation to the circumstances of the death, and
- (b) the Lord Advocate—
- 10 (i) considers that it is highly likely that a finding or recommendation set out in the determination would have been materially different if the evidence had been brought forward at the inquiry, and
- (ii) decides that it is in the public interest for further inquiry proceedings to be held in relation to the circumstances of the death.
- (3) For the purposes of subsection (2)(a), “new evidence” is evidence which was not available, and could not with the exercise of reasonable diligence have been made available, at the inquiry.
- 15 (4) For the purposes of subsection (1), an inquiry ends when the sheriff makes a determination in the inquiry.
- (5) In this section and sections 29 and 30, references to the holding of further inquiry proceedings in relation to a death are references to—
- 20 (a) the re-opening and continuation of an inquiry into the death, or
- (b) the holding of a fresh inquiry into the death.

**29 Precognition of witnesses**

- (1) Subsection (2) applies where the Lord Advocate is considering whether further inquiry proceedings should be held in relation to the death of a person.
- 25 (2) The procurator fiscal may cite a person to attend for precognition in connection with that consideration.
- (3) This section is sufficient warrant for such citation.
- (4) Subsection (5) applies where a person cited under subsection (2)—
- 30 (a) having been given reasonable notice in the citation, and without reasonable excuse, fails to attend for precognition at the time and place mentioned in the citation, or
- (b) does so attend but refuses to give information which is—
- (i) within the person’s knowledge, and
- (ii) relevant to the Lord Advocate’s consideration.
- 35 (5) The sheriff may, on the application of the procurator fiscal, make an order requiring the person to attend for precognition or, as the case may be, give the information at a time and place specified in the order.
- (6) A person who fails to comply with an order under subsection (5) commits an offence.

- (7) A person who commits an offence under subsection (6) is liable on summary conviction to imprisonment for a term not exceeding 21 days or a fine not exceeding level 3 on the standard scale or both.
- (8) In this section and section 30, references to the sheriff are references to a sheriff of the sheriffdom in which the inquiry into the person’s death was held.

**30 Initiating further proceedings**

- (1) Where further inquiry proceedings are to be held in relation to the death of a person in accordance with section 28(2), the procurator fiscal must give the sheriff—
  - (a) notice that such proceedings are to be held,
  - (b) a copy of the determination made in relation to the death (“the original determination”),
  - (c) a brief account of the nature of the new evidence mentioned in section 28(2)(a), and
  - (d) any other information required by an act of sederunt under section 34(1).
- (2) On receiving notice under subsection (1)(a), the sheriff must make an order—
  - (a) setting aside the original determination, and
  - (b) either—
    - (i) re-opening the inquiry into the death, or
    - (ii) requiring a fresh inquiry to be held into the death.

**31 Re-opened inquiries**

- (1) Sections 14 to 17 apply in relation to a re-opened inquiry into the death of a person as they apply in relation to any other inquiry, subject to subsections (2) to (4).
- (2) The sheriff must, when making the order under section 30(2) re-opening the inquiry, also make an order under section 14(2) in relation to the re-opened inquiry (and section 14(1) (which requires the procurator fiscal to notify the sheriff that an inquiry is to be held) does not apply).
- (3) The procurator fiscal must give notice of the re-opened inquiry under section 16(1), in addition to the persons mentioned in section 16(2), to any person not mentioned in that section—
  - (a) who was a participant in the original inquiry proceedings, or
  - (b) to whom a recommendation in the determination in those proceedings was addressed by virtue of section 25(5)(b).
- (4) The notice required by section 16(1) and (3) must include notice of—
  - (a) the fact that the inquiry has been re-opened (and section 16(1)(a) does not apply), and
  - (b) the matters to which the new evidence relates.
- (5) Evidence may be brought forward at a re-opened inquiry only if it relates to a matter to which the new evidence relates.
- (6) But the sheriff may—

- (a) require evidence to be brought forward about any other matter relating to the circumstances of the death, or
- (b) on the application of the procurator fiscal or a participant in the inquiry, allow such evidence to be brought forward.

5 (7) In this section—

“new evidence” means the new evidence mentioned in section 28(2)(a),

“original inquiry proceedings” means the part of an inquiry held before it is re-opened under section 30(2),

“re-opened inquiry” means the part of an inquiry held after it is so re-opened.

### 10 **32 Fresh inquiries**

(1) This section applies where the sheriff makes an order under section 30(2) setting aside the determination in an inquiry (“the original inquiry”) and requiring a fresh inquiry to be held.

15 (2) The sheriff must, when making the order, also make an order under section 14(2) in relation to the fresh inquiry (and section 14(1) (which requires the procurator fiscal to notify the sheriff that an inquiry is to be held) does not apply).

(3) The procurator fiscal must give notice of the fresh inquiry under section 16(1), in addition to the persons mentioned in section 16(2), to any person not mentioned in that section—

20 (a) who was a participant in the original inquiry, or

(b) to whom a recommendation in the determination in that inquiry was addressed by virtue of section 25(5)(b).

(4) The fresh inquiry is to be held in the sheriffdom in which the original inquiry was held (and section 12(2) (which requires the Lord Advocate to choose where the inquiry is to be held) does not apply).

25 (5) Subsection (4) is subject to section 12(3).

### **33 Further inquiry proceedings: compliance with recommendations**

(1) This section applies where—

30 (a) a determination (“the original determination”) made in an inquiry into the death of a person has been set aside under section 30(2)(a), and

(b) the sheriff makes a determination (“the new determination”) in the re-opened inquiry or, as the case may be, the fresh inquiry into the death.

(2) Section 27(1) does not apply in relation to a person to whom a recommendation is addressed in the new determination if a recommendation in the same terms was addressed to the person in the original determination.

35 (3) Subsection (4) applies where—

(a) a recommendation was addressed to a person in the original determination, but

(b) a recommendation in the same terms is not addressed to the person in the new determination.

40 (4) The Scottish Courts and Tribunals Service must withdraw from publication—

- (a) a response to the recommendation published under section 27(5)(a), or
- (b) a notice published under section 27(5)(b) in relation to the recommendation.

*Inquiry procedure rules*

**34 Power to regulate procedure etc.**

- 5 (1) The Court of Session may by act of sederunt make provision for or about—
- (a) the practice and procedure to be followed in inquiry proceedings,
  - (b) any matter incidental or ancillary to an inquiry.
- (2) Without limiting the generality of subsection (1), the power in that subsection includes power to make provision for or about—
- 10 (a) the giving of notice under section 16,
- (b) the conduct and management of inquiry proceedings, including the use of technology,
- (c) the form of any document to be used in, or in connection with, inquiry proceedings,
- 15 (d) the process by which a person becomes a participant in an inquiry,
- (e) the representation of the procurator fiscal and participants in inquiry proceedings, including representation of participants by persons who—
- (i) are neither solicitors nor advocates, or
  - (ii) do not have the right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990,
- 20 (f) witnesses and evidence, including modifying the rules of evidence as they apply to an inquiry,
- (g) action to be taken by the procurator fiscal and the participants before the start of an inquiry or a re-opened inquiry,
- 25 (h) the fees payable to solicitors and advocates in relation to inquiry proceedings,
- (i) the expenses payable to persons attending inquiry proceedings,
- (j) the appointment of assessors under section 23(1) (including their functions and the terms on which they may be appointed),
- 30 (k) the giving and publication of responses under section 27,
- (l) such other matters as the Court thinks necessary or appropriate for the purposes of carrying out or giving effect to the provisions of any enactment (including this Act) relating to inquiry proceedings or matters incidental or ancillary to such proceedings.
- 35 (3) An act of sederunt under subsection (1) may make—
- (a) incidental, supplemental, consequential, transitional, transitory or saving provision,
  - (b) provision amending, repealing, or revoking any enactment (including any provision of this Act) relating to matters with respect to which an act of sederunt may be made,
- 40

- (c) different provision for different purposes.
- (4) Before making an act of sederunt under subsection (1) with respect to any matter, the Court of Session must—
- (a) consult the Scottish Civil Justice Council, and
- 5 (b) take into consideration any views expressed by the Council with respect to that matter.
- (5) Subsection (4) does not apply in relation to an act of sederunt that embodies, with or without modifications, draft rules submitted by the Scottish Civil Justice Council to the Court of Session.
- 10 (6) Schedule 1 makes further provision (including transitional provision) in relation to the regulation of the practice and procedure to be followed in inquiry proceedings.

*Specialist sheriffs and summary sheriffs*

**35 Judicial specialisation in inquiries**

- 15 (1) The sheriff principal of a sheriffdom may designate one or more sheriffs or summary sheriffs of that sheriffdom as specialists in inquiries for the purposes of this Act.
- (2) The sheriff principal may at any time withdraw a designation made under subsection (1).
- (3) The Lord President of the Court of Session may designate one or more part-time sheriffs or part-time summary sheriffs as specialists in inquiries for the purposes of this Act.
- (4) The Lord President may at any time withdraw a designation made under subsection (3).
- 20 (5) The designation of a sheriff, summary sheriff, part-time sheriff or part-time summary sheriff (a “designated judicial officer”) under subsection (1) or (3) does not affect the competence of any other member of the judiciary of the sheriffdom to conduct inquiry proceedings.
- (6) Subsection (7) applies where the sheriff principal is exercising any function relating to the allocation of inquiry proceedings.
- 25 (7) The sheriff principal must have regard to the desirability of ensuring that inquiry proceedings are conducted by a designated judicial officer.
- (8) In subsection (5), the reference to a member of the judiciary of the sheriffdom is to be construed in accordance with section 136(2) of the Courts Reform (Scotland) Act 2014.

**36 Summary sheriff: competence to conduct inquiries**

A summary sheriff may, in relation to inquiry proceedings, exercise the jurisdiction and powers that attach to the office of sheriff.

*General*

**37 Repeal and modification of enactments**

- 35 (1) The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 is repealed.
- (2) Schedule 2 modifies other enactments.

**38 Interpretation**

In this Act, unless the context requires otherwise—

“advocate” means a member of the Faculty of Advocates,

“child” means a person who has not yet reached the age of 18 years,

“inquiry” has the meaning given by section 1(5),

“inquiry proceedings” has the meaning given by section 10(2)(a),

5 “participant” is to be construed in accordance with section 10(2)(b),

“procurator fiscal” means any procurator fiscal, assistant procurator fiscal, procurator fiscal depute or person duly authorised to execute the duties of a procurator fiscal,

“re-opened inquiry” has the meaning given by section 31(7),

10 “solicitor” means a solicitor enrolled in the roll of solicitors kept under section 7 of the Solicitors (Scotland) Act 1980.

### **39 Ancillary provision**

15 (1) The Scottish Ministers may by regulations make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Act.

(2) Regulations under subsection (1)—

(a) may—

(i) make different provision for different purposes,

20 (ii) modify any enactment (including this Act),

(b) are subject to—

(i) the affirmative procedure if they add to, replace or omit any part of the text of an Act,

(ii) otherwise, the negative procedure.

### **40 Commencement**

(1) This section and sections 38, 39 and 41 come into force on the day after Royal Assent.

(2) The remaining provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under subsection (2) may—

30 (a) include transitional, transitory or saving provision,

(b) make different provision for different purposes.

### **41 Short title**

The short title of this Act is the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2015.

SCHEDULE 1  
*(introduced by section 34(6))*

PROCEDURE RULES

*Role of the Scottish Civil Justice Council*

- 5 1 (1) The Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 is amended in accordance with this paragraph.
- (2) In subsection (1) of section 2 (functions of the Council)—
- (a) after paragraph (ba) insert—
- “(bb) to review the practice and procedure followed in inquiry proceedings  
 10 under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2015,”
- (b) after paragraph (c)(ii) insert—
- “(iii) draft inquiry procedure rules,”
- (3) After subsection (7) of that section insert—
- 15 “(8) For the purposes of this Part, “draft inquiry procedure rules” are draft rules prepared with a view to the making by the Court of Session of an act of sederunt under section 34(1) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2015.”
- (4) In section 4 (Court of Session to consider rules)—
- 20 (a) in subsection (1), for “or draft tribunal procedure rules” substitute “, draft tribunal procedure rules or draft inquiry procedure rules”,
- (b) in subsection (2), for “or draft tribunal procedure rules” substitute “, draft tribunal procedure rules or draft inquiry procedure rules”.
- (5) In subsection (1) of section 16 (interpretation of Part 1), after the entry relating to draft  
 25 civil procedure rules insert—
- ““draft inquiry procedure rules” has the meaning given in section 2(8),”.

*Transitional arrangements*

- 2 (1) Until paragraph 1 comes into force, section 34 applies as if, instead of conferring power on the Court of Session to make provision by act of sederunt for or about the matters  
 30 mentioned in paragraphs (a) and (b) of subsection (1), that subsection conferred power on the Scottish Ministers to make such provision by regulations (and subsection (3) of that section is to be read accordingly).
- (2) Section 34(4) does not apply in relation to regulations made by virtue of sub-paragraph (1).
- 35 (3) Before making regulations by virtue of sub-paragraph (1), the Scottish Ministers must consult—
- (a) the Lord President of the Court of Session,
- (b) such other persons as they consider appropriate.
- (4) Regulations by virtue of sub-paragraph (1) are subject to the negative procedure.

SCHEDULE 2  
*(introduced by section 37(2))*  
MODIFICATION OF ENACTMENTS

*Gas Act 1965*

- 5        1        In the Gas Act 1965, section 17(4) (accidents) is repealed.

*Health and Safety at Work etc. Act 1974*

- 2        In the Health and Safety at Work etc. Act 1974, section 14(7) (power of the Health and Safety Executive to direct investigations and inquiries) is repealed.

*Energy Act 2013*

- 10       3        In section 85 of the Energy Act 2013 (inquiries), subsections (7) and (8) are repealed.

# **Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill**

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision for the holding of public inquiries in respect of certain deaths.

Introduced by: Michael Matheson  
Supported by: Paul Wheelhouse  
On: 19 March 2015  
Bill type: Government Bill

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

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill introduced in the Scottish Parliament on 19 March 2015. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 63–EN.

### **POLICY OBJECTIVES OF THE BILL**

2. The policy objective of the Bill is to reform and modernise the law governing the holding of fatal accident inquiries (FAIs) in Scotland. It largely implements the recommendations made in the 2009 Review of the Fatal Accident Inquiry Legislation<sup>1</sup> led by the Rt Hon the Lord Cullen of Whitekirk KT, the former Lord President of the Court of Session, insofar as these have not already been implemented.

3. The Review made 36 recommendations for change. The Scottish Government published a response to the Review in March 2011<sup>2</sup> and has accepted the majority of these recommendations, but has diverged in a small number of areas which are explained in this Policy Memorandum. Many of the recommendations of the Review will be implemented by rules to be made under a power given in the Bill as they concern matters which either do not require primary legislation or are more appropriate for setting out in rules as they concern the routine organisation of Fatal Accident Inquiries (FAIs).

4. Some of Lord Cullen's recommendations were addressed to the Crown Office and Procurator Fiscal Service (COPFS) and have already been implemented, principally by the establishment of the Scottish Fatalities Investigation Unit (SFIU), which now has responsibility for overseeing the progress from the outset of all cases for which an FAI is mandatory or in respect of which it seems likely that exercise of the Lord Advocate's discretion to hold an FAI will be exercised.

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<sup>1</sup> <http://www.gov.scot/Publications/2009/11/02113726/0>

<sup>2</sup> <http://www.gov.scot/Publications/2011/03/18150120/0>

5. The policy objectives of the Bill are to—
- build on the recommendations implemented by COPFS to make the system more efficient;
  - extend the categories of death in which it is mandatory to hold a fatal accident inquiry;
  - place a requirement on those to whom sheriffs direct recommendations at the conclusion of the inquiry to respond;
  - permit discretionary FAIs into deaths of Scots abroad where the body is repatriated to Scotland;
  - permit FAIs to be re-opened if new evidence arises or, if the evidence is so substantial, to permit a completely new inquiry to be held; and
  - provide flexibility for the locations and accommodation for FAIs.

## **BACKGROUND**

6. The proposals and reforms set out in this Bill are part of the wider Making Justice Work Programme that the Scottish Government is working on in partnership with the Scottish Courts Service, the Scottish Legal Aid Board, the COPFS, the Scottish Courts and Tribunals Service (SCTS) and others. This programme brings together a number of workstreams to secure high quality, affordable and accessible justice for people in Scotland. This includes improving support for victims and witnesses of crime, and changes to the system for criminal prosecution.

### **Fatal accident inquiries in Scotland**

7. Procurators fiscal have a traditional and long established role in investigating all sudden, suspicious, accidental and unexplained deaths to establish the cause of death and the circumstances which gave rise to the death. Fiscals will carry out a full and thorough investigation into the circumstances and will decide whether any criminal proceedings are necessary or whether it would be appropriate to instruct a fatal accident inquiry. Only the procurator fiscal can apply for a fatal accident inquiry which is a public examination of the circumstances of the death.

8. Approximately 11,000 deaths are reported to procurators fiscal each year. Death investigations are carried out by COPFS in around half of these, so about 5500 cases. There are only 50-60 FAIs per year. Thus, the overwhelming majority of deaths investigated by procurators fiscal do not result in a fatal accident inquiry. Of the 50-60 inquiries which are held each year, very few ever come to the attention of the Government, Parliament or the media.

9. The law on FAIs is currently set out in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (“the 1976 Act”). The Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 (as amended) were made under section 7(1) of the Act.

10. Inquiries are mandatory in cases of death as a result of an accident in the course of employment or in legal custody (section 1(1)(a) of the 1976 Act). Even in the cases where an FAI would otherwise be mandatory, however, it is open to the Lord Advocate (under section

1(2)) to decide that it is unnecessary to hold an FAI if the circumstances of the death have been sufficiently established in criminal proceedings. Similarly, if there has been an investigation under the Gas Act 1965, the Health and Safety at Work etc. Act 1974, or the Energy Act 2013, the Lord Advocate can decide that it is unnecessary to hold an FAI.

11. In other cases, an FAI may be held at the discretion of the Lord Advocate if it appears expedient in the public interest that an inquiry should be held on the grounds that the circumstances of the death are sudden, suspicious or unexplained, or has occurred in circumstances such as give rise to serious public concern.

12. FAIs are judicial inquiries before sheriffs or sheriffs principal held in the public interest. The Procurator Fiscal leads evidence with a view to ascertaining the facts relevant to the death and possible recommendations. It is not the purpose of an FAI to establish blame or guilt in the civil or criminal sense. The purpose is simply to establish the facts surrounding the death, specifically the time, place and cause of death.

13. In addition, however, the sheriff may make recommendations as to reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided; the defects, if any, in any system of working which contributed to the death or any accident resulting in the death; and any other facts which are relevant to the circumstances of the death. Such recommendations may be intended to prevent deaths in similar circumstances in the future. Sheriffs make such recommendations in around a third of all FAIs.

#### *Bereaved families*

14. FAIs are therefore not specifically held on behalf of the bereaved family. Indeed some families do not want FAIs to be held into the deaths of their loved ones as they do not want the possibly distressing details of the death to be aired in public. Sometimes, however, the public interest demands that such an inquiry is held, although great sensitivity will be employed in relation to the concerns of families.

15. As FAIs are held in the public interest, they are not the forum in which personal legal redress should be sought. If the bereaved family believe that their loved one's death was a result of, for example, negligence, then the appropriate remedy is to raise civil proceedings claiming damages for personal injury. It should be emphasised that, as the Faculty of Advocates has commented recently<sup>3</sup>, "the issues in personal injury actions are different from those in FAIs – the FAI is inquisitorial, it does not attribute fault or blame, it makes no findings in negligence, and there are no monetary damages to be assessed by the sheriff."

16. As a judicial inquiry and not a civil court case, there are no appeals in an FAI, however an application of judicial review of the decision to hold or not hold a FAI is possible.

17. While the evidence given at an FAI is admissible in other proceedings, so that it may be used to challenge the credibility or reliability of evidence given in such proceedings, the sheriff's determination at the conclusion of the FAI may not be founded on in other proceedings. For

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<sup>3</sup> [http://www.advocates.org.uk/downloads/news/responses/20131121\\_inquiriesresponse.pdf](http://www.advocates.org.uk/downloads/news/responses/20131121_inquiriesresponse.pdf)

example, it is also not appropriate for the determination of a sheriff at a judicial inquiry held in the public interest to be led in as evidence of fault in adversarial proceedings, as the purpose of the inquiry was not directed towards the bestowal rights or obligations on anyone.

### **Review of the fatal accident inquiry legislation**

18. In March 2008, the then Cabinet Secretary for Justice, Kenny MacAskill MSP, announced that a major review of the operation of the Fatal Accident Inquiries legislation was required and appointed Lord Cullen to lead the review.

19. The remit of the Review was as follows—

"to review the operation of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, which governs the system of judicial investigation of sudden or unexplained deaths in Scotland, so as to ensure that Scotland has an effective and practical system of public inquiry into deaths which is fit for the 21<sup>st</sup> century".

20. The reason for commissioning a review was that the relevant legislation was over 30 years old and it was felt that the system of FAIs might not have kept pace with other parts of the justice system which had been, or were about to be, the subject of review.

21. The Justice Committee of the Scottish Parliament and others had raised specific concerns about the system of FAIs, such as delays in holding FAIs and the status of the recommendations made by sheriffs at the conclusion of inquiries. These and other questions were discussed in a wide-ranging debate before the Scottish Parliament on 27 March 2008<sup>4</sup>.

22. The table below summarises each recommendation followed by detail of implementation. Some of the non-legislative recommendations were directed at the COPFS and have already been implemented (see paragraph 31). Recommendations that are supported and require changes to legislation will be taken forward by the Scottish Government either in the Bill or in rules to be made under the Bill. The remaining recommendations are a matter for the Lord President and SCTS, for which new legislation is not required.

<b>Recommendation</b>		<b>Implementation</b>
1	Ensure distinction between FAIs and criminal cases by: not holding FAIs in a criminal courtroom; dispensing of and wigs, gowns and hostile questioning	Matter for Lord President and SCTS
2	Sheriff with appropriate skills and experience to be assigned to a complex FAI	Section 35
3	Judicial Institute of Scotland to provide training on FAIs	Current practice
<b>Mandatory FAIs</b>		
4	Maintain provision for mandatory FAIs into work-	Section 2

<sup>4</sup> <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4786>

	related deaths	
5	Extend legislation to cover death of a person detained by police; term “borstal institution” to be changed to “secure accommodation”	Section 2
6	Independent investigation for the death of a person subject to compulsory detention by a public authority within the meaning of section 6 of the Human Rights Act	Not being taken forward
7	Extend legislation to cover death of a child in a “secure care”	Section 2
8	The Lord Advocate’s power to make an exemption from a mandatory inquiry (if the circumstances have been adequately investigated in criminal proceedings) should be extended to cases where a public inquiry has been held under the Inquiries Act 2005	Section 3
<b>The scope of FAIs</b>		
9	Allow for single FAIs in multiple-sheriffdom deaths and for all factors to be considered before deciding the location of an FAI	Sections 11 to 13
10	Lord Advocate has discretion to apply for an FAI when a person died abroad and body repatriated to Scotland	Section 6
<b>Decisions against the holding of an FAI</b>		
11	Written reasons to be provided to relatives when decided not to hold an FAI	Section 8
<b>Crown Office and Procurator Fiscal Service</b>		
12	Central FAI team led by an Advocate depute or senior prosecutor to oversee FAI resources, training and performance	Implemented
13	Central team to track FAI cases and provide support	Implemented
14	Central team to maintain statistics relating to FAI cases	Implemented
15	Central team to ensure contact with COPFS	Implemented
16	Victim Information and Advice (VIA) officers to be trained in FAIs and bereavement	Implemented
17	Ensure FAIs held as promptly as possible after the death	Implemented
<b>The proceedings</b>		
18	Procurator fiscal (PF) to apply for FAI early on when a mandatory case and keep all parties informed of investigation	Not being taken forward due to need to consider criminal proceedings – COPFS do, however, keep families informed of progress of investigation
19	Hold a preliminary hearing in every case to ensure FAI is effective, fair and efficient	Section 15
20	At the preliminary hearing the sheriff should fix the date for the commencement of the hearing of evidence,	For rules

*This document relates to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (SP Bill 63) as introduced in the Scottish Parliament on 19 March 2015*

	approve and settle the issues, and identify the extent to which any issues or matters are capable of being resolved	
21	Copies of documents to be circulated prior to the preliminary hearing	For rules
22	Power to allow case to be transferred to a different court or sheriffdom	Section 12
23	Relatives of the deceased should not have to justify the reasonableness of the granting of legal aid; and the limit should be increased for legal aid in FAIs	Not being taken forward
24	Civil partners and cohabitants should be allowed to participate in an FAI the same as spouses	Section 10
25	General provision for the receipt in evidence of a written statement, including an affidavit – the same as civil Ordinary Cause rules of evidence	Section 19 and rules
26	There should be a comprehensive self-contained set of rules for FAIs	Section 34
27	Power for the sheriff to not hold part of the FAI in public	Section 20
<b>Determinations</b>		
28	Sheriffs should use a standard form of determination with an agreed structure	For rules
29	Clarify the meaning of section 6(1)(c) in legislation to ensure consistent interpretation of the test and use of hindsight	Section 25
30	Power for the sheriff to make recommendations to any body concerned with safety as well as a party of the FAI in order to prevent other similar deaths	Section 25
31	SCTS website should contain all FAI determinations which are fully searchable	Section 27
32	Duty on bodies subject to recommendations to make a written response to SG confirming steps taken to implement, if any, with reasons	Section 27, though responses will be to SCTS
33	SG website to provide information on recommendations and response from bodies, including an annual report	Not being taken forward
34	Power for the sheriff to direct who receives a copy of the determination to ensure lessons learned	Section 26
<b>Fresh proceedings</b>		
35 & 36	The Lord Advocate should have the power to re-open closed FAIs if new evidence is available and it is in the public interest	Sections 28 to 33

## **Criticism of the current system**

23. The current system of FAIs has been subject to a number of criticisms which are considered below along with Lord Cullen's recommendations, the Scottish Government's proposals for dealing with these issues, including alternative approaches.

### **Delays**

24. There has been considerable criticism of long delays which sometimes occur between the date of death and the start of the FAI. There are, however, 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
- 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.

25. In relation to criminal proceedings, FAIs are not usually held until a decision has been taken on whether a prosecution is appropriate in relation to a particular death. The evidence at criminal proceedings could be prejudiced by being aired previously at an FAI where the burden of proof is lower than for a criminal trial. Even where a report from a regulatory body states that it is issued without prejudice to future criminal proceedings, its findings may be picked up by the media and could unduly colour the recollections of witnesses and the judgement of the facts as presented by potential members of any jury: this may be enough to be perceived as prejudicing a fair trial.

26. Under the current legislation, for mandatory FAIs (section 1(2) of the 1976 Act) once criminal proceedings have been concluded, the Lord Advocate may decide that the circumstances of the death have been sufficiently established in the course of those criminal proceedings and may conclude that the public interest is not served by holding an FAI which would effectively mean that the same evidence would be led again at a judicial inquiry at public expense. The Scottish Government understands that at present 59% of cases<sup>5</sup> which would otherwise result in a mandatory FAI do not proceed because the circumstances of death have been sufficiently established in criminal proceedings.

27. Some incidents such as helicopter crashes are complex in themselves and a thorough investigation takes time and should not be rushed. In his Review, Lord Cullen did not recommend any timescales for the opening of an FAI following a death (paragraph 6.14 of Lord Cullen's Review). Lord Cullen also commented in a letter to the Cabinet Secretary for Justice in January 2014—

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<sup>5</sup> Concluded cases relating to deaths in the course of employment which were reported to the Health and Safety Division of COPFS

“It is plainly not practical or realistic to make it mandatory that an FAI must open within a certain period of the date of the death of the deceased. That is because of the diversity and potential complexity of the cases, and because other investigations or proceedings may have to be completed first.”

28. If artificial timeframes were to be adopted, these would likely mean that a fatal incident may not be adequately investigated, or investigated in a rush, and the cause of death may not be satisfactorily established.

*Cullen recommendations addressed to COPFS*

29. COPFS have implemented all six of the recommendations set out in the Cullen Review addressed to it (Recommendations 12-17 of 36). In particular, those which would speed up death investigations have already been given effect, principally by the establishment of COPFS’ Scottish Fatalities Investigation Unit (SFIU).

30. SFIU now have responsibility for overseeing the progress from the outset in all cases for which an FAI is mandatory or in respect of which it seems likely that exercise of the Lord Advocate’s discretion to hold an FAI will be exercised. Since its inception, and now as part of continual process of improvement, SFIU have re-prioritised current death investigations to ensure those awaiting resolution for some time are expedited and new individual timescales have been established to conclude each such investigation. All cases have been reviewed, with COPFS managers setting new targets for reporting.

31. SFIU has become the central point for the provision of advice to procurators fiscal investigating deaths locally; for liaison with Crown Counsel regarding the direction and focus for deaths investigation; for liaison with the nearest relatives of the deceased’s family and for providing them with reasons where the Lord Advocate decides not to apply for an FAI, either verbally or in writing depending on what method of communication is most appropriate in the circumstances.

32. Following the introduction in April 2012 of the Federation structure within COPFS, SFIU was reorganised to mirror that with SFIU North, SFIU East and SFIU West being established and SFIU National team becoming the central team for the provision of advice to colleagues in the local SFIU teams, for liaison with Crown Counsel and with primary responsibility on policy matters relating to deaths. The Heads of the three SFIU teams report directly to the overall Head of SFIU National who is a Senior Prosecutor.

33. A database of cases is held by SFIU for internal use which differentiates between mandatory and discretionary FAIs and records relevant dates and detail in order to track the progress and timings of cases and to maintain statistical data. SFIU have also compiled details of suitable experts to whom Procurators Fiscal can be referred which is updated on a regular basis.

**Status of sheriffs’ recommendations**

34. Under section 6(1)(a) to (e) of the 1976 Act, a sheriff is required to set out in his determination at the conclusion of an inquiry the place and time of the death and any accident

resulting in the death and the cause or causes of such death and any accident resulting in the death. The Sheriff may also set out—

- the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided,
- the defects, if any, in any system of working which contributed to the death or any accident resulting in the death, and
- any other facts which are relevant to the circumstances of the death.

35. Some commentators have suggested that sheriffs' recommendations should become legally binding on the persons or bodies to whom they are addressed. It is difficult to see how making a sheriff's recommendations legally binding would work in practice. The flexibility currently offered by the present system is seen as an advantage, given that the recommendations from a particular inquiry may have wider implications which need to be considered in a broader context.

36. Where sheriffs do make recommendations, there is no evidence that their recommendations are routinely being ignored and the general experience is that they are taken very seriously by the bodies to whom the recommendations have been directed. Often remedial action has been taken by the time the inquiry is held.

37. The recommendations from one inquiry may only be relevant to the circumstances of that case and may be unlikely to be applicable across the board. What is appropriate in one case may not be in another. There may also be very legitimate reasons not to implement a sheriff's recommendation such as unintended consequences. A sheriff may also not take into account the potential cost of a particular recommendation and the party to whom the recommendation is directed may well conclude that the cost of compliance may vastly exceed the real or likely possibility that the precaution would actually prevent a death in the future.

38. In addition, many sheriffs' recommendations are couched in terms whereby they suggest that bodies should consider a certain course of action. Sheriff Principal Pyle, at the conclusion of the FAI into the 2009 Super Puma helicopter crash in the North Sea<sup>6</sup>, suggested that Eurocopter, as the manufacturer of Super Puma helicopters, the Civil Aviation Authority and the European Aviation Safety Agency should together consider methods of oil analysis of Super Puma helicopters. It would be pointless making it legally binding that parties should simply consider a certain course of action.

39. If recommendations were to become legally binding, the Faculty of Advocates have suggested (in their response to the consultation on the Inquiries into Deaths (Scotland) Bill promoted by Patricia Ferguson MSP) that FAIs would become longer, more expensive and more adversarial, as parties will want to be represented and will fight harder to ensure that they are not unnecessarily burdened with legally binding recommendations.

40. Furthermore, if sheriffs were aware that any recommendation they make will become legally binding, the Scottish Government is concerned that sheriffs would be disinclined to make

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<sup>6</sup> <http://www.scotland-judiciary.org.uk/10/1244/Fatal-Accident-Inquiry---Super-Puma-Helicopter-Crash>

recommendations since FAIs as judicial inquiries are not the forum to impose rights or burdens on parties.

41. For all of these reasons, the Scottish Government does not believe that it would be appropriate to make sheriffs' recommendations legally binding. The Bill does, however, contain proposals which are intended to foster accountability on the part of parties to whom sheriffs' recommendations are addressed and greater transparency in the process by obliging those parties to respond to recommendations, indicating how they intend to comply.

### **Bereaved families**

42. Criticism has been made in the recent past that bereaved families are not kept informed about matters such as the progress of death investigations, the likelihood of an FAI being held and its likely timescale. It has been alleged that families are kept in the dark and have to wait years to get answers to questions they may have about the death of their loved one. It has been suggested that families need to be put at the heart of the process.

43. It is worth bearing in mind that FAIs are judicial inquiries which are held in the public interest to establish the time, place and cause of a death and to identify reasonable precautions which may be taken to prevent deaths in similar circumstances. They are not held specifically for the benefit of the families.

44. COPFS make considerable efforts to ensure that bereaved families are informed about death investigations. Fiscals take time to meet with the families to explain the process of the investigation and to keep the family up to date with progress. Whether or not an FAI is ultimately instructed, the nearest relatives are given the opportunity to be fully engaged in the investigative process. At an early stage, nearest relatives are provided with a point of contact in the procurator fiscal's office so that they can raise any concerns and issues directly with that person. This process can sometimes lead to additional investigation being undertaken by the procurator fiscal to address such concerns.

45. Relatives bereaved by homicide, road traffic incidents and in circumstances likely to lead to a mandatory fatal accident inquiry are supported by the COPFS Victim Information and Advice (VIA) service. VIA staff will provide general information to nearest relatives about the process of deaths investigation and fatal accident inquiry procedures. They will provide case-specific information about the progress of the investigation and inquiry and can facilitate referral to local support agencies.

46. Once death investigations are concluded, relatives are invited to discuss the findings with the procurator fiscal and, where an FAI is discretionary, their views as to whether there should be an FAI will be explored and taken into account. But the families' views cannot be the only determining factor. It can be the case that different parts of a family may have different views, so "the family" may not be speaking with one voice.

47. It is therefore the case that families are kept fully apprised of progress with death investigations and the likelihood and timing of an FAI. The needs and desires of the family

cannot, however, supersede the public interest and the need to learn lessons in order to avoid deaths in similar circumstances.

### **Representation and legal aid**

48. Some commentators have suggested that legal aid should be more easily available. Some sheriffs have also occasionally suggested that an FAI would have been of more value if the bereaved family had received legal aid in order to permit them to be legally represented. The purpose of a fatal accident inquiry is to investigate the circumstances of death in the public interest in order to try to avoid any future incident of the same kind. The procurator fiscal leads evidence to establish the cause of death.

49. Procurators fiscal thus have a public duty to fulfil at the inquiry. They will meet with the family to discuss what witnesses and evidence they intend to produce at the inquiry and what questions they intend to ask. Often the fiscal will ask the family if there are any particular questions that they wish to be answered. But it can happen sometimes that the families have questions which the fiscal does not feel that it would be appropriate for them to ask, since they are representing the public interest.

50. It may be that families may wish to ask questions which may be intended to establish whether there are grounds for civil proceedings following the fatal accident inquiry. In such cases they may consider that they require their own legal representative.

51. If the family cannot afford to pay for such legal representation, they may be eligible to receive legal aid. The Scottish Legal Aid Board can make legal aid available where a person entitled to be represented at a fatal accident inquiry can show that they have concerns which the procurator fiscal is not going to raise at the Inquiry. Any application for legal aid will be subject to the usual three statutory tests of financial eligibility, probable cause and reasonableness (i.e. whether it is reasonable to the Scottish Legal Aid Board in the particular circumstances of the case that legal aid should be provided).

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

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

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

This view is reinforced by the fact that, in the current financial climate, it has been necessary to reduce overall legal aid expenditure significantly. Ministers are determined

to do this in a way which maintains access to justice as far as possible, and do not believe that removing a test of reasonableness specifically for FAIs would contribute to this aim. All civil legal aid applications need to meet the statutory tests of probable cause and reasonableness.

The Scottish Legal Aid Board has published guidance explaining the current approach taken when assessing reasonableness in these applications.

Since it is for the procurator fiscal to investigate the circumstances of a sudden death, there must be a clear basis for a relative of the deceased requiring their own publicly funded legal representation. The basis of this approach is rooted in the function of the inquiry itself, namely that it is a fact finding exercise, and not one which seeks to apportion blame or fault.

Notwithstanding, the reasonableness test is likely to be met if a relative can demonstrate that they have a discernible interest that is unlikely to be subject to investigation by the procurator fiscal, necessitating that they have their own legal representation.

Where a death occurs in legal custody, we accept that it would be generally reasonable for relatives of the deceased to have independent representation, given that the investigation is being conducted by an agent of the State.

In respect of financial limits, the government has already significantly extended eligibility by increasing the disposable income limit to £26,239. It is estimated that this has increased the availability of civil legal aid to about 75% of the population, albeit in some cases with a contribution. Extending assistance to those of greater means would reduce the amount available to those who have less.

Turning to legal aid in respect of relatives under Article 2 of the European Convention on Human Rights, when an inquiry is investigating a potentially unlawful killing by agents of the State, or as outlined above, a death in legal custody, then we accept that it will be generally appropriate for relatives of the deceased to secure independent legal representation. Accordingly, the tests of probable cause and reasonableness should be easy for an applicant to satisfy.”<sup>7</sup>

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

### **Accommodation**

55. There has been criticism in the past that FAIs should not be held in court rooms as the surroundings are too reminiscent of criminal proceedings and such surroundings add to the stress

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<sup>7</sup> <http://www.gov.scot/Publications/2011/03/18150120/3>

of bereaved families. Lord Cullen recommended that FAIs should be taken out of court buildings into other accommodation more suitable for such proceedings. He suggested that an FAI should, where possible, not be held in a sheriff courtroom, but in other appropriate premises; and, where it was unavoidable that the FAI should be held in a courtroom, care should be taken to select one with the least connection with criminal proceedings.

56. The Scottish Government consulted on two options: an increased use of some ad-hoc locations that have been used in the past for longer FAIs; and the development of dedicated FAI centres, separate to the sheriff courts, to hear all FAIs.

#### *Ad hoc locations*

57. The first option was to allow greater flexibility to permit FAIs to be dealt with in certain ad hoc locations, but those which relate to deaths in rural or remote areas should continue to be dealt with in local sheriff courts if there is court capacity. This would mean that bereaved families and witnesses would not have to travel longer distances to attend the FAI (and perhaps incur accommodation costs), which would add to their stress.

58. Of the consultees who responded to the questions on FAI accommodation, 83% agreed with the proposed greater use of ad hoc premises as well as sheriff courts. Respondents who agreed felt that flexibility in the system was important as well as local justice and knowledge.

#### *Bespoke, dedicated FAI centres*

59. The second option at consultation was that all FAIs would be held only in bespoke, dedicated centres, with specialist sheriffs, with one in the North of Scotland, one in the East and one in the West. This option would ensure that an out of court environment in line with Lord Cullen's recommendations was provided in all cases, and that there would be no competing business demands.

60. This option was, however, rejected by 72% of consultees who responded to the questions on FAI accommodation who mostly cited the expense of providing such centres, the likelihood that they would be under-employed (since there are only around 50 FAIs per annum) and the cost and inconvenience to bereaved families who would have to travel to such centres.

#### *Justice centres*

61. SCTS is considering the feasibility of Justice Centres in key strategic population centres, including Fife, Lanarkshire and the Highlands. It envisages that these centres will provide a full range of specialist support services and will complement the high quality courts which exist in many of Scotland's cities. There may therefore be merit in considering the incorporation of dedicated FAI accommodation into the SCS long-term vision for "justice centres".

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

## **SCOTTISH GOVERNMENT CONSULTATION (GENERAL)**

63. On 1 July 2014 the Scottish Government published a consultation on proposals to reform and modernise the law on FAIs in Scotland<sup>8</sup>. The consultation sought views which would inform a prospective Bill to replace the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. The document explained that the proposals were intended to largely implement the recommendations of Lord Cullen's Review of the Fatal Accident Inquiry Legislation.

64. The Scottish Government has held a number of meetings throughout the consultation process between officials and key stakeholders including the Lord President's Private Office, the Crown Office and Procurator Fiscal Service, the President of the Sheriffs' Association, the Law Society of Scotland, the Faculty of Advocates, the STUC, the Mental Welfare Commission, the Royal College of Psychiatrists in Scotland, the SCTS, the Scottish Prison Service and Lord Cullen himself.

65. A total of 57 analysable responses to the consultation paper were received, 8 from individuals and 49 from organisations. On 15 October 2014 the Scottish Government published the non-confidential consultation responses<sup>9</sup> and on 21 November 2014 it published an independent analysis by Craigforth<sup>10</sup>. The analysis showed broad support for the legislative proposals.

## **SECTION 104 ORDER**

66. In general the Bill is regarded as relating to the devolved matter of FAIs in Scotland. It will be within devolved competence to hold an FAI into the death abroad of persons domiciled in Scotland where the body is repatriated to Scotland. The Lord Advocate will retain his role as head of the system of investigation of deaths in Scotland.

67. The Coroners and Justice Act 2009 contains arrangements for FAIs to be held into deaths of Scottish military service personnel which occur abroad, it also amends the current FAI legislation. The Bill re-enacts these provisions without policy modification and by doing so such re-enactment is considered to be within competence. The Bill also re-enacts the existing requirement that a death in the course of employment will attract a mandatory FAI, again without policy modification.

68. An Order under section 104 of the Scotland Act 1998 will be required to extend parts of the Bill to the remainder of the United Kingdom. It will be required to extend publishing restrictions in relation to a child's identity, extend provisions on those parts of the continental shelf which are subject to Scots law and extend the provisions on the death of service personnel. All such extensions reflect the current extent of the legislation which will be replaced. The Order may also be required to make consequential modification of reserved legislation as it interacts with the FAI system, and to make amendments to legislation as it applies outwith Scotland.

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<sup>8</sup> <http://www.gov.scot/Publications/2014/07/6772>

<sup>9</sup> <http://www.gov.scot/Publications/2014/10/8764>

<sup>10</sup> <http://www.gov.scot/Publications/2014/11/2861>

## **ALTERNATIVE APPROACHES**

69. An alternative approach would have been to retain the status quo and not implement the recommendations of the Review of the Fatal Accident Inquiries Legislation. However, such an approach would mean that the current problems identified by Lord Cullen and stakeholders would remain.

70. This Policy Memorandum sets out in more detail how the Scottish Government proposes to specifically implement the recommendations and any alternative approaches considered where this is not part of the overall package recommended by the Review or differs from the Review proposal.

### **Inquiries into Deaths (Scotland) Bill**

71. Another alternative approach would have been to adopt the proposals in the Inquiries into Deaths (Scotland) Bill, a member's Bill proposed by Patricia Ferguson MSP. Ms Ferguson consulted on her proposals from August 2013 to January 2014.

72. Ms Ferguson has brought forward final proposals for legislation and has received sufficient support from MSPs to have the right to introduce her Bill. Since at least one respondent to the Government's consultation indicated a preference for Ms Ferguson's legislative proposals, it seems appropriate to address how the changes proposed would have affected the system of FAIs.

73. The main terms of Ms Ferguson's original draft proposal were—

- to extend the scope of inquiries to cover work-related deaths not resulting from accidents, such as deaths from industrial diseases and deaths resulting from exposure at work to certain substances;
- to refer appropriate cases to specialist sheriff courts, and to give the families of the deceased person a more central role in the process; and
- if parties to whom recommendations made by sheriffs at the conclusion of inquiries are addressed do not comply with those recommendations they will in some circumstances be guilty of an offence.

74. Ms Ferguson's final proposal was—

Proposal for a Bill to re-enact, with amendments, the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976—

(a) to extend the scope of inquiries to cover work-related deaths not resulting from accidents (such as deaths from industrial diseases and deaths resulting from exposure at work to certain substances), deaths of persons receiving compulsory mental health treatment and deaths of children subject to a child protection order;

(b) to refer appropriate cases to specialist sheriff courts, to give the families of the deceased person a more central role in the process, and to provide that recommendations made by the sheriff are enforceable in certain circumstances and subject to appeal.

*Equal treatment of all work-related deaths*

75. Ms Ferguson's consultation stated that there should be no distinction between deaths as a result of accidents in the course of employment (which currently trigger mandatory FAIs unless criminal proceedings are instigated and the Lord Advocate believes that those proceedings obviate the need for an FAI) and what are termed "other workplace incidents which lead to the death of a worker".

76. This proposal seems to be intended to bring industrial diseases and other employment issues (such as exposure to chemicals, biohazards, etc) within the ambit of the FAI legislation. It is not clear, however, what 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, 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.

77. The STUC have indicated to the Government that it believes that it is necessary to extend the ambit of mandatory FAIs to take into account deaths which may arise as a result of new working practices in industries such as nano-technologies and fracking. Any deaths arising in any new industry, which did not fall within the current types of death which require a mandatory FAI, could however, rightly raise issues of public concern and would be addressed by the holding of a discretionary FAI.

*Deaths of persons receiving compulsory mental health treatment*

78. The Mental Welfare Commission Scotland and the Royal College of Psychiatrists both oppose mandatory FAIs for patients who are subject to compulsory mental health detention orders and have commented that deaths of this category of patient give rise to no more concern than deaths of other mental patients.

*Deaths of children subject to a child protection order*

79. In relation to children subject to a child protection order, the Scottish Government is proposing that deaths of children who are held in secure accommodation should be the subject of mandatory FAIs. In cases of deaths of children who are in some other way looked after by the state, it would be a matter for the discretion of the Lord Advocate as to whether an FAI is required.

*Specialist sheriff courts*

80. Ms Ferguson has proposed that it should be possible for inquiries into deaths from work related incidents to be held before specialist personal injury sheriffs or the specialist personal injury court with an all-Scotland jurisdiction, both of which will be delivered under the Courts Reform (Scotland) Act 2014. Ms Ferguson has set out her belief that there should be two circumstances where the FAI should go to the specialist personal injury court: first, where the Lord Advocate considers it appropriate because the case has special features which justify it being held at that court; or second, where the family of the deceased believes that the specialist court should hear the inquiry and where the Lord Advocate is unable to show special cause to the contrary.

81. This proposal misunderstands the purpose of an FAI which is a fact-finding forum held in the public interest and which does not attempt to apportion blame or guilt in the civil or criminal sense. Personal injury actions are adversarial civil actions. A personal injury action and an FAI are two entirely different legal specialisms. Personal injury cases require, among other things, knowledge and understanding of the specialist personal injury process, expertise on what is required to prove legal causation, and an expertise on the law of negligence and damages. None of these are involved in an FAI, which is a judicial inquiry held in the public interest, not the private interest. Placing FAIs in the specialist personal injury court would run contrary to the Government's policy to reverse the recent trend for FAIs to become more adversarial. The Government is, however, proposing that it will be possible for sheriffs and summary sheriffs to specialise in FAIs, which may better meet Ms Ferguson's policy aims.

*Giving families a more central role in the process*

82. Ms Ferguson argued that the families of the deceased feel marginalised by the inquiry process. She claimed that they are peripheral, feel out of touch and have no statutory right in terms of the inquiry process.

83. Ms Ferguson therefore proposed that legislation should—

- provide circumstances within which the family of the deceased may influence the court where the inquiry is heard;
- give the family a right to full and transparent reasons for any decision made by the Lord Advocate which, in turn, may allow them to question and challenge the Lord Advocate's decision;
- the right to obtain access to evidence held by other parties and to request that the court require other parties to produce certain evidence;
- the right to influence and shape the nature and extent of the inquiry undertaken into the death of their family member.

84. As a general observation, Ms Ferguson's draft Bill as drafted would seem to be an attempt to overturn the decision in *Alice Emm's Petitioner* (2011 CSIH 7) which was an appeal against a decision of the Lord Advocate to refuse to order an FAI into a death in hospital. The broad thrust of her proposed Bill seems to be to transfer power to investigate deaths from COPFS, who act in the public interest, to bereaved families who may be seeking to establish grounds for civil redress.

85. The views of the family are already taken into account when the venue for an FAI is being decided, but their view alone cannot be the deciding factor. The Scottish Government has made proposals for the location and accommodation of FAIs which take into account Lord Cullen's recommendation that they should, wherever possible, be held outwith court premises.

86. Ms Ferguson's proposals seemingly do not take account of the efforts which have been made in recent years by COPFS (set out above) to meet with bereaved families to explain the process of an investigation into a sudden, suspicious or unexplained death and to keep the family up to date with progress.

87. It is not appropriate for bereaved families to be able to access evidence held by other parties or to request that the court requires other parties to produce certain evidence. Apart from the fact that the death may be subject to criminal investigation and evidence cannot be released in case it prejudices any future trial and possible conviction, this proposal again seems to be predicated on the need for parties, rather than the court, taking the inquiry forward.

#### *Transparency*

88. The issue of delays in FAIs has been covered above and Lord Cullen did not recommend that timescales should be imposed on death investigations due to the complexity and diversity of FAIs. Some 80% of respondents to the Scottish Government's consultation agreed that timescales were not desirable.

89. Lord Cullen recommended that, in circumstances where an FAI is discretionary and the Lord Advocate decides that no FAI should be held, written reasons for the decision should be provided to relatives of the deceased if requested by them. This reflects COPFS' current practice.

90. Ms Ferguson has, however, proposed that the Lord Advocate should be obliged to give reasons for **all** of his decisions. She feels that this will place power in the hands of the families of the deceased to question the Lord Advocate and, where appropriate, to challenge his decision by way of judicial review, though it is open to parties to challenge decisions of the Lord Advocate by means of judicial review at present.

91. Ms Ferguson's proposal would, however, mean that bereaved families and their lawyers would effectively control the system of FAIs. COPFS receive circa 11,000 death reports per annum. In relation to every one of those deaths COPFS will make at least one decision and in many of them a great number of decisions. Roughly 5500 death investigations are conducted by COPFS each year. If they are to provide reasons for each and every decision in each case then an almost overwhelming and unachievable burden will be placed on them.

92. Nearest relatives would have a right to "influence and shape the nature of the Inquiry undertaken into the death of their family member" under Ms Ferguson's proposals. Relatives often try to influence and shape the nature and extent of inquiries under the current system. Sometimes the family do not agree with each other and so there are a number of family interests which may be conflicting.

93. Often families' inquiries and complaints relate to something other than the cause of death, for example the manner in which medical or nursing staff interacted with their relatives, rather than the quality and level of care given. COPFS often receive complaints from the public regarding such issues which are wholly unrelated to the cause of death and are not matters for COPFS. Such a right would give rise to numbers of cases where the investigation never ended as the nearest relatives might raise issue after issue and, given this right, the case could not be closed.

*The enforceability of sheriffs' recommendations*

94. Ms Ferguson has claimed that the recommendations made by sheriffs are often ignored at present. As noted above, there is no evidence that this is the case. The enforcement provisions in Ms Ferguson's Bill would permit the sheriff to call before him or her any party to whom recommendations have been made after a certain period of time to ascertain if those recommendations have been implemented and, in certain circumstances where they have not, the party will be guilty of a criminal offence under the Bill.

95. This proposal envisages a continuing involvement in the enforcement of recommendations by the sheriff. Presumably a sheriff would only call a party back to court if another party complained that the recommendation had not been implemented. This would have major implications for shrieval and court resources if such a proposal were to be adopted, since FAI proceedings would effectively continue, possibly indefinitely, while interested parties complained to the sheriff – with justification or not – that recommendations had not been implemented.

96. As noted above, there would be other practical difficulties in making a sheriff's recommendations legally binding. Lord Cullen did not recommend that sheriffs' recommendations should be legally binding. In addition, and by way of comparison, there is no legal enforceability of recommendations from coroners' inquests in the rest of the United Kingdom.

97. The Scottish Government's alternative proposals for the dissemination of, and compliance with, sheriffs' recommendations are set out below.

*Costs*

98. The financial impacts of Ms Ferguson's Bill are not possible to estimate at this stage, though if her proposal for all deaths caused by industrial disease to trigger an FAI, then the numbers of inquiries would rise significantly, with a consequential increased cost to the public purse.

99. There may be very significant financial implications in the potentially huge cost of providing written reasons in all cases. The provisions regarding influencing and shaping inquiries would result in the procurator fiscal being unable to decline to investigate alleged issues and would undoubtedly result in a significant increase in costs.

**THE BILL**

100. The Bill repeals and re-enacts the 1976 Act in a modern, easily read and understood style. Additional provisions are added to take into account Lord Cullen's recommendations insofar as these are to be implemented and other matters informed by the Government's consultation on the legislative proposals.

## **Inquiries into certain deaths**

101. The purpose of the Bill is to replace and modernise the framework of FAIs in Scotland. It makes it clear that the duty of the procurator fiscal is to investigate the circumstances of the death which is to be the subject of the inquiry and then to arrange for an FAI to be held. This follows on from the procurator fiscal's traditional, common law role of investigating sudden, suspicious or unexplained deaths in Scotland. But not all such death investigations result in FAIs. Indeed, only a fraction do so. As stated above, there are roughly 11,000 deaths reported to COPFS each year of which around half are investigated, but only around 50 to 60 FAIs are held. So it is important to understand that large numbers of deaths are the subject of an independent investigation in Scotland even though only a relatively small number are the subject of an FAI.

102. The policy of the Bill is that FAIs should have two purposes only. First, they must establish the circumstances of the death which is the subject of the inquiry. This includes the time, place and cause or causes of the death or the accident which caused the death and any recommendations as to how that specific death might have been avoided. Second, FAIs may consider what precautions or improvements might be taken or made to prevent other deaths in similar circumstances in the future. This does not, however, mean that the scope of FAIs may be widened to consider matters which are not related to the death which is the subject of the FAI such as, for example, in the case of deaths of female prisoners, whether it is right that women should be sent to prison. Such policy matters are not for FAIs, but should rather be examined by public inquiries or even Royal Commissions.

103. The Bill specifically states that the purpose of an FAI is not to establish either civil or criminal liability. The circumstances of a sudden death may well lead to criminal proceedings or a bereaved family may believe that the death was caused by another party's negligence in which case they may raise an action for damages. But FAIs are inquisitorial judicial inquiries held in the public interest – they do not bestow rights or obligations, nor should they be used to try to further such legal interests.

104. Inquiries will continue to be heard by sheriffs and occasionally by sheriffs principal and the Bill introduces the possibility that an FAI may be heard by a summary sheriff. They will continue to be held in public, though the Bill does make provision for an FAI or part of it to be held in private.

### *Inquiry into more than one death*

105. Lord Cullen pointed out that the current system of FAIs does not address situations in which clusters of deaths occur within different sheriffdoms, but have arisen from a single event or raise common or even identical issues, for example, as a result of a particular infection. Lord Cullen therefore recommended that the Lord Advocate should be able to hold a single FAI into multiple deaths in more than one sheriffdom and the Bill provides for this.

## **Inquiries into deaths occurring in Scotland**

### *Mandatory inquiries*

106. The Bill retains the two categories where it is mandatory that an FAI is held as in section 1(1)(a) of the 1976 Act: deaths as a result of an accident in the course of employment and deaths in legal custody. The latter category is extended as described below. The category of deaths in the course of employment is, as under the 1976 Act, intended to cover all deaths at work irrespective of whether the deceased was an employee, self-employed or an employer.

107. Lord Cullen recommended that the mandatory category in relation to “legal custody” should be (i) updated to refer to the Prisons (Scotland) Act 1989 and (ii) extended to cover the death of a child while being kept in “secure accommodation”; and the death of any person who is under arrest, or subject to detention by, a police officer at the time of death.

108. The definitions in the Bill have been updated to taken into account the provisions of the Prisons (Scotland) Act 1989 and “child” is now defined as a person who has not yet reached the age of 18. Whether a person’s death is caught by this provision relates to their status as kept or detained at the time of their death and is wider than their physical location.

109. The Association of Chief Police Officers in Scotland raised the issue with Lord Cullen of FAIs relating to persons who may die in police custody or detention, not in a police station or cell, but possibly at the roadside, at a football match, hospital or other location. In practice COPFS have in the past taken the practical view that if a person dies while in police custody or detention then an FAI will be held even if the death did not take place in a police station or cell as specified in section 1(4)(b) the 1976 Act. The policy in the Bill is now to put the matter beyond doubt and that an FAI will be held on a mandatory basis if it occurs in police custody irrespective of the location of the death. Police custody will now be defined in terms of the Criminal Justice (Scotland) Bill. The provisions in that Bill which relate to police custody are expected to become law prior to this Bill.

110. Mandatory FAIs will apply to children in secure accommodation irrespective of the route by which the child arrived in that accommodation. They may have been placed there as a result of a criminal prosecution or for their own protection. The death of any child in any other form of residential care may result in a discretionary FAI (unless it is a natural cause or expected death) but such deaths are very rare.

111. Lord Cullen also recommended that the category of case in which an FAI is mandatory should include 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.

112. The Scottish Government consulted on two proposals: first that the aim of an independent investigation into the death of a person subject to compulsory detention by a public authority should be met by an investigation by the procurator fiscal and exercise of the Lord Advocate’s discretion on completion of that investigation. Some 74% of respondents to the Scottish Government’s consultation on FAIs last summer agreed with this proposal.

113. Second, the Scottish Government sought views on the option of a case review by a public authority such as the Mental Welfare Commission could be combined with a discretionary power to hold an FAI. Some 59% of respondents disagreed with this proposal.

114. Neither the Royal College of Psychiatrists (RCPsych) nor the Mental Welfare Commission Scotland (MWCS) favoured mandatory FAIs for the death of every person subject to compulsory detention by a public authority. RCPsych noted that the MWCS is already automatically informed of any deaths of detained patients and has the discretionary option of carrying out its own independent investigation and inquiry. RCPsych also noted that there was already a requirement to report suicides, sudden unexplained deaths and deaths to the procurator fiscal where there is a concern about healthcare contributing to the death and that the Lord Advocate has the discretion to hold an FAI in such circumstances.

115. If there was a requirement to report to the procurator fiscal deaths of all those detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995, then RCPsych reported a strong view among its members that the current discretionary power to have a FAI would be a sufficient safeguard. They commented that there would be little public interest in having an automatic FAI for a patient who dies an expected death from an unrelated physical health problem.

116. The Scottish Government understands from the Royal College of Psychiatrists that there is a graduated scale of investigations which are carried out into mental health deaths—

- adverse incidents (an internal review);
- critical incident reviews (these involve a consultant from another Health Board area);
- significant adverse incident reviews (involving another Health Board);
- independent investigations by the Mental Welfare Commission Scotland;
- independent investigation by the procurator fiscal and possibly a discretionary FAI.

117. It may be that there is a case for these various inquiries and investigations to be formalised and rationalised, though not necessarily in legislation. The Scottish Government does not, however, believe that this Bill is the vehicle for this.

118. For all of these reasons, the Bill does not require a FAI to be held into deaths of mental patients in compulsory detention by the state, though it maintains the power of the Lord Advocate to exercise his or her discretion to hold one however.

#### *Mandatory inquiries: exceptions*

119. The policy of the Bill is to retain the discretion afforded by section 1(2) of the 1976 Act whereby the Lord Advocate may decide not to hold an FAI where the circumstances of a death have been sufficiently established in criminal proceedings. This policy is justified because if the circumstances have already been sufficiently ascertained, there is usually little point in holding a second judicial inquiry at public expense.

120. It can, however, happen that the Lord Advocate will decide that an FAI should proceed notwithstanding that there have already been criminal proceedings. It may be decided that the public interest demands that there should be an FAI, perhaps because it is thought that the sheriff may make recommendations as to how deaths in similar circumstances may be avoided in the future. The Bill ensures that this option remains one for the Lord Advocate.

121. The investigation into a death reported to COPFS will mean that criminal proceedings are normally considered before any decision is taken on holding an FAI. The time taken for the investigation, and consideration of whether criminal proceedings are appropriate, can be lengthy and there has been criticism that this contributes to delays in holding FAIs.

122. FAIs cannot, however, usually be held until decisions have been taken on whether criminal proceedings are appropriate in any particular case. If there has been behaviour which merits criminal sanction then it is important that this is properly dealt with – for example, criminal offences under health and safety legislation. But it is also essential that thorough, painstaking death investigations are conducted, particularly into complex incidents such as helicopter crashes – these should not be rushed so that the cause is established properly.

123. Specialist staff from COPFS keep bereaved families advised on progress of death investigations and support them throughout all stages of the investigation, as well as any criminal or FAI proceedings which are held.

124. The case of the sinking of the Flying Phantom tug in the Clyde in September 2007 provides a case in point<sup>11</sup>. Two separate prosecutions were taken forward under the Health and Safety at Work etc. Act 1974 during which the circumstances of the accident were clearly established<sup>12</sup>. The Lord Advocate then decided that no FAI should be held in December 2014.

125. The Bill consolidates the current law, providing that, in addition to criminal proceedings, the Lord Advocate may also decide that an FAI is not necessary because the circumstances of a death have been established in inquiries under the Gas Act 1965, the Health and Safety Act 1974, or the Energy Act 2013. In a new step the Bill also provides that the Lord Advocate may decide that an FAI is not necessary because the circumstances of the death have been sufficiently established under the Inquiries Act 2005.

126. Clearly the exception for criminal proceedings is the factor which is most often cited by the Lord Advocate for not holding an FAI which would otherwise be mandatory. It is understood that in relation to deaths in the course of employment which were reported to the Health and Safety Division of COPFS, 27 cases were concluded in the last four years: of those, seven resulted in no criminal proceedings being taken and seven mandatory inquiries were then held. In 20 cases a prosecution took place and 16 inquiries were waived: four were not waived. The percentage figure is therefore that in 59% of those concluded cases relating to deaths in the course of employment which were reported to the Health and Safety Division of COPFS, no mandatory inquiry was held because it was waived in terms of section 1(2) of the 1976 Act.

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<sup>11</sup> [http://www.maib.gov.uk/cms\\_resources.cfm?file=/FlyingPhantom.pdf](http://www.maib.gov.uk/cms_resources.cfm?file=/FlyingPhantom.pdf)

<sup>12</sup> <http://www.scotland-judiciary.org.uk/8/1173/HMA-v-SVITZER-MARINE>  
<http://www.scotland-judiciary.org.uk/8/1323/HMA-v-CLYDEPORT-OPERATIONS-LIMITED>

127. It is less likely that the FAI would be waived in relation to deaths in legal custody as the majority of such deaths are either as a result of suicide or natural causes and would not normally lead to consideration of prior criminal proceedings. However it is of course possible that the death may have been as a result of a murder or culpable homicide, or contraventions of health and safety.

#### *Discretionary inquiries*

128. The policy intention is that the Lord Advocate should retain discretion to instruct the holding of an FAI in circumstances where an FAI is not mandatory. As under the 1976 Act, this will be in cases where a death was sudden, suspicious or unexplained or occurred in circumstances giving rise to serious public concern and where it is in the public interest.

129. In relation to the public interest in holding an inquiry, this will clearly relate to the circumstances of the death which may have caused serious public apprehension and disquiet or, alternatively, it may be desired to ask a sheriff to consider the circumstances of a death with a view to making recommendations whereby deaths in similar circumstances may be avoided in the future.

130. In some cases a bereaved family may want an FAI to take place into the circumstances of a death which does not fall within the mandatory categories. Their reasons for requesting an FAI will be carefully considered by COPFS, as part of the decision making process. Occasionally nearest relatives want an FAI to take place in order that evidence can be explored for potential civil action. An FAI is not designed for this purpose. The views of the family will be taken into account by the Lord Advocate and COPFS in reaching a decision on whether a discretionary inquiry should be held, but this is not the only consideration. Inquiries are held in the public interest and the family's private interest in, say, obtaining damages are best pursued through civil proceedings for damages. On the other hand, many families may not want the distress of an FAI, but again the public interest must be considered and it may be determined that such an inquiry should take place.

#### *Reasons for decision not to hold an inquiry*

131. There are a number of reasons why the Lord Advocate may instruct that an FAI will not be held. The Lord Advocate may come to the view that—

- the death did not occur as a result of an accident at work;
- the person was not in legal custody or kept or detained in secure accommodation;
- although the circumstances of the death fall within one of the mandatory categories, they have been sufficiently established in other proceedings and it is not in the public interest to have another inquiry at public expense;
- the death was not sudden, suspicious or unexplained, or occurred in circumstances giving rise to serious public concern;
- it is not in the public interest to have an inquiry.

132. If the Lord Advocate decides not to hold an FAI, it has been the practice of COPFS to inform the bereaved family. This could be done in face to face meetings or in writing. Respondents to Lord Cullen's recommendation suggested that a more detailed reasoned decision should be provided. The judges of the Supreme Court said in their consultation response that "a more formal intimation of the reason or reasons may help to bring closure to the families concerned, if not satisfy them completely". The policy is therefore that only certain persons (certain family members) specified in the Bill should receive written reasons for the decision not to hold an FAI if they so request.

133. Lord Cullen took the view that if bereaved families understand the decision not to hold an FAI better, this may reduce applications for judicial review. He thought, however, that relatives may not always want a formal, reasoned decision, which is why the Bill provides that written reasons will only be provided on request.

#### *Certain deaths and accidents to be treated as occurring in Scotland*

134. The policy of the Bill is that FAIs should continue to be held in relation to deaths within Scotland and at sea above the continental shelf opposite Scotland where related to the oil and gas industry. Deaths abroad are dealt with below.

#### **Inquiries into deaths occurring abroad**

135. Under the 1976 Act, there is no provision to hold an FAI into the death of a person domiciled in Scotland who dies abroad, even if the body is repatriated to Scotland. In England and Wales, a coroner who is made aware that the body of a deceased person is within that coroner's area must, as soon as practicable, conduct an investigation into the person's death if—

- the deceased died a violent or unnatural death;
- the cause of death is unknown; or
- the deceased died while in custody or otherwise in state detention.

136. This applies even where the death occurs abroad, but the body has been repatriated to the area of a particular coroner.

137. Lord Cullen expressed the view that it would be unjustifiable to hold mandatory FAIs into the deaths of all Scots who happen to die or are killed abroad. He recommended, however, that, where the body of a person domiciled in Scotland who dies abroad is repatriated, an FAI may be held at the discretion of the Lord Advocate and that the Lord Advocate should consider "whether there had been circumstances which called for investigation, whether there had been a satisfactory investigation in the country where the death took place and whether there was a prospect of an FAI yielding significant findings." Lord Cullen thought that, out of respect for the investigating authorities in the foreign jurisdiction, such discretion might be exercised rarely.

138. There is no proposal to hold FAIs into deaths in other parts of the United Kingdom. The system of coroners' inquests may be relied upon to conduct thorough investigations into deaths of Scots in England, Wales or Northern Ireland.

139. The Bill provides that the power to hold an FAI into the death of a person ordinarily resident in Scotland who dies or is killed abroad should be at the discretion of the Lord Advocate and should only apply where the body is repatriated to Scotland. As with other discretionary inquiries, the death must have been sudden, suspicious or unexplained or occurred in circumstances giving rise to serious public concern. There is no intention to hold an FAI into natural cause deaths on holiday, for example. As suggested by Lord Cullen, the Lord Advocate will consider whether there has been a sufficient investigation of the death in the country where it took place and whether there is a real prospect that those circumstances would be established at an FAI. The Lord Advocate must also consider whether an FAI would be in the public interest.

140. It should be noted that COPFS, in investigating a death which took place outwith Scotland and the UK, will have no powers to require foreign witnesses to attend the inquiry or to require the submission of evidence from a foreign country. It is expected that COPFS will investigate deaths abroad in the same manner as coroners in England and Wales. This will largely be achieved by liaison through the Foreign and Commonwealth Office (FCO) who will in turn liaise with the relevant foreign government and/or legal authorities. As is the case with death investigations into deaths within Scotland, it is expected that the vast majority of investigations into deaths abroad will not require an FAI.

141. FCO advises that some foreign countries do not co-operate with investigations into deaths of foreign citizens within their borders by the deceased person's home state. Others will co-operate, but the level and enthusiasm of such co-operation varies from state to state and documentation or evidence may not be released for months or even years after the death. The level of likely co-operation from the country where the death occurred is one of the matters which the Lord Advocate will have to consider in deciding whether to exercise the discretion.

#### *Inquiries into deaths occurring abroad: service personnel*

142. The general provision on investigation into deaths abroad does not apply to deaths of armed forces service personnel. Legislation enacted at Westminster came into force in September 2012 to permit FAIs to be held in Scotland into deaths of Scottish domiciled service personnel abroad. This is provided for in sections 12 of the Coroners and Justice Act 2009, with section 50 of that Act inserting section 1A of the 1976 Act. The Scottish Government worked closely with the Ministry of Defence (MoD), the Ministry of Justice (MoJ) and COPFS about this legislative change when it was enacted and also in the run-up to commencement.

143. In appropriate cases, each military fatality where there are known links to Scotland will be the subject of discussion between the offices of the Secretary of State for Defence and the Lord Advocate. Where affected families intimate that they wish the death of their loved one to be considered at an FAI in Scotland, instead of at a coroner's inquest in England and Wales, it is expected that an FAI will be held. The Lord Advocate will then decide in which sheriffdom the FAI should be held and undertake the investigation towards that inquiry.

144. Since 2012, it has been possible in law for the deaths abroad of Scottish domiciled service personnel to be investigated in Scotland under the FAI system in order that bereaved families do not have to travel to attend a coroner's inquest in England. The Bill replicates the provisions of section 1A of the 1976 Act.

## **Participants and location**

### *Persons who may participate in the inquiry*

145. The Bill replicates the provisions of the 1976 Act in relation to who, apart from the procurator fiscal, may participate at an FAI, though a person who is co-habiting with the deceased as if married and a civil partner of the deceased is now included. Being recognised as a participant means that the person has the right to appear at the inquiry, to cite witnesses, to bring forward evidence including witnesses and to cross-examine witnesses. As under the 1976 Act, any person other than those specified in the Bill may participate if the sheriff is satisfied the person has an interest in the inquiry.

146. Becoming a participant in the inquiry allows that person to cite witnesses. Accordingly, the policy is that (apart from those who have a right to participate and who are specified in the Bill), a person must apply to the sheriff to be a participant in the inquiry and it is the decision of the sheriff whether someone may participate. It is the policy that the sheriff will be able to remove a person who has been granted participant status by virtue of provisions set out in FAI rules.

147. In some cases those who wish to take part in an inquiry will not be known to the procurator fiscal and sheriff and only seek permission to be a participant at the preliminary hearing or even at the inquiry proper. At that point the sheriff will determine whether they are to be admitted.

148. The procedure for all of this, including the form of an application to participate, its timing and the decision-making process undertaken by the sheriff in deciding whether to admit a person as a participant, will be a matter for FAI rules.

### *Places at which inquiries may be held*

149. Under section 1(1) of the 1976 Act, an FAI is currently required to be held in the sheriff court district which appears to be most closely connected with the circumstances of the death, which restricts the accommodation options for the hearing to be held. The policy of the Bill is to remove the “close connection to the place of death restriction”, to allow an FAI to be held in the most appropriate accommodation in any sheriffdom. This will allow better use to be made of existing available court and tribunal estate and other ad hoc locations. It will mean that it should be easier to find accommodation for FAIs since they often have to compete with criminal business especially in busy sheriff courts and this may mean that FAIs will take place more quickly than might otherwise have been the case. This will also allow the flexibility required for SCTS and COPFS to use the most appropriate accommodation taking into account the needs of the likely participants and would allow for future accommodation options, including justice centres, to be considered.

150. The Bill proposes that the Scottish Ministers will be able to make regulations to designate places at which a sheriff court may be held for the purposes of holding an FAI. These places will be in addition to the places already designated for the holding of sheriff courts under the Courts Reform (Scotland) Act 2014. “Places” in this sense means the towns and cities where sheriff courts are held – it does not mean specific buildings. It therefore follows that a sheriff court may be held in a building within a sheriff court district which is not normally used for

court purposes and this has already permitted FAIs to be held in ad hoc locations such as, for example, the Council Chamber in Aberdeen City Chambers and the Maryhill Community Centre in Glasgow. The Bill goes further, however, to permit places to be designated for the holding of FAIs where there is currently no sheriff court. This will add hugely to the flexibility of the system.

151. Except in the case of the initial regulations establishing the first locations, such regulations will only be made by the Scottish Ministers if SCTS submit a proposal to Ministers, having consulted such persons as it considers appropriate. Such a proposal will only be made with the agreement of the Lord President of the Court of Session. The Scottish Ministers in turn will only make regulations with the consent of the Lord President and SCTS.

#### *Jurisdiction in relation to inquiries*

152. Though it is expected that the majority of FAIs will continue to be held in the same sheriffdom as the place of death, the policy of the Bill is that the FAI should not have to be held in the same sheriff court district or even the same sheriffdom where the death occurred.

153. The Lord Advocate will therefore be permitted to choose the sheriffdom in which the FAI is to be held, in consultation with SCTS. The Lord Advocate will not, however, be able to choose the place or building within the sheriffdom where the FAI will be held, which will be a matter for discussion between the sheriff principal, SCTS and COPFS, with the views of the participants taken into account. This is considered to be an administrative matter which is not provided for in the Bill. This is to allow the varying responsibilities to be reflected. Sheriffs principal are responsible for the efficient disposal of business in their sheriffdom, while SCTS is responsible for the accommodation and staffing of FAI proceedings.

154. The sheriff will be permitted to transfer the FAI to another sheriffdom, but only after the preliminary hearing has been held or dispensed with. The proposal to transfer the FAI may be made at the sheriff's own initiative or, should the sheriff agree, at the instigation of the procurator fiscal or one of the other participants at the inquiry. It is not expected that this power will be utilised very often. It may be, however, that the sheriff, having read the account of the circumstances of the death provided by the procurator fiscal or after the preliminary hearing, comes to the view that, perhaps because the bereaved family and/or most of the witnesses come from another sheriffdom, then it would be more convenient for those parties if the FAI was held there. The sheriff will have to obtain the consent of the sheriff principal of the sheriffdom in which the FAI is currently situated as well as that of the sheriff principal of the sheriffdom to which it is proposed to transfer before the FAI may transfer, reflecting the sheriff principal's statutory duty to ensure the efficient disposal of business within their respective sheriffdom.

155. Alternatively, however, it may be that transfer is sought because it is expected that the proceedings will be lengthy and complex and it is decided that the FAI should be held at an ad hoc location which happens to be in another sheriffdom. By transferring to such a location, the FAI may be held more quickly than if it is necessary to wait for court capacity to be found in the original sheriffdom.

## **Procurator fiscal's investigation**

156. The policy of the Bill is to replicate the power in section 2 of the 1976 Act to permit the procurator fiscal in pursuance of the investigation of the death which is to be the subject of the inquiry to cite witnesses for precognition. The Bill maintains the two stage process of citation for precognition in that if a witness who is cited fails to attend for precognition without reasonable excuse or refuses to give information, then the fiscal may apply to the sheriff for an order requiring the witness to attend or give information and failure to comply with such an order will be subject to criminal sanction.

## **Pre-inquiry procedure**

### *Initiating the inquiry*

157. Whereas section 1(3) of the 1976 Act provides for the fiscal to make an application to the sheriff for an FAI, the policy of the Bill is that the fiscal should simply notify the sheriff that an FAI is to be held. As an FAI must be held where the death falls within the mandatory category in the Bill or when the Lord Advocate decides that one is to be held, the word “notify” better reflects that the sheriff does not determine an application for an FAI.<sup>13</sup>

158. The sheriff could still refuse to hold an inquiry under his or her inherent powers, if the sheriff considers the proposed inquiry to be vexatious or an abuse of process.

159. The fiscal will also be required to give the sheriff a brief account of the circumstances of the death so far as they are then known to the fiscal. The sheriff will then make an order fixing the date and place for the preliminary hearing and FAI (unless the sheriff considers that it is not appropriate to fix the date of the FAI until the preliminary hearing) and granting warrant for the fiscal and participants to cite persons to attend the FAI to give evidence. The right to cite persons to give evidence does not crystallise unless and until the sheriff admits a party to the FAI as a participant. In most cases, however, the participants will be known and the more notice given to witnesses the greater the chance that they will be free to attend.

### *Preliminary hearings*

160. The policy of the Bill is that it should be the norm for a preliminary hearing to be held for each FAI. In this way the sheriff will become aware of the likely volume of evidence, whether there are vulnerable witnesses involved, etc. It should become clear how much time will have to be scheduled for the holding of the FAI. If the amount of evidence is considerably more than was originally anticipated, the date, and possibly also the location, of the inquiry may have to be re-scheduled. If more than one preliminary hearing is required (as is often the case), this may also lead to the date of the actual inquiry hearing being put back. The sheriff may, however, decide to dispense with the requirement, though the Bill provides for a subsequent order for a preliminary hearing. It will, however, remain possible for the sheriff to decide to dispense with the preliminary hearing.

161. Rules will be made to cover the practice and procedure of preliminary hearings for FAIs, including the circumstances in which a sheriff may dispense with holding one.

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<sup>13</sup> See for example Carmichael “Sudden Deaths and Fatal Accident Inquiries” Third Edition at 3.18.

### *Notice of the inquiry*

162. After the sheriff has made an order fixing the date and place for the holding of a preliminary hearing and for the start of the inquiry, the procurator fiscal must then notify potential participants and provide a public notice of the intention to hold an inquiry and its date and location.

### *Agreement of facts before an inquiry*

163. The 1976 Act did not provide for the agreeing of evidence between parties to the inquiry. Practice appears to vary among sheriffs and many insist on witnesses being called rather than evidence being agreed, as they take the view that it is inappropriate to agree evidence between parties in what is a judicial inquiry before a sheriff. To provide for agreed statements on matters which are not in doubt may, however, have a beneficial impact on the duration of FAIs as matters which are agreed as fact between the parties need not detain the court.

164. In his Review, Lord Cullen drew attention (at para 7.4) to the scope for dealing with non-controversial matters by means other than oral evidence. He suggested that matters may be agreed by joint minute between the procurator fiscal and the interested parties and that this was compatible with the inquisitorial nature of the proceedings. He thought, however, that if any of the interested parties was not legally represented, such agreement should be subject to the approval of the sheriff.

165. The policy of the Bill is therefore to make it possible to have FAI Rules which allow evidence to be agreed in a joint minute by the fiscal and participants of uncontroversial facts which are unlikely to be disputed before the start of the FAI hearing. It has been suggested that there might be a duty placed on parties to agree evidence where possible similar to section 257 of the Criminal Procedure (Scotland) Act 1995. If it is possible for the prosecutor and the accused to agree facts which are unlikely to be disputed by any of the other parties in criminal proceedings, where the standard of proof is higher than at an FAI, then there is no reason why this should not be possible in an FAI.

## **The inquiry**

### *The powers of the sheriff*

166. The policy of the Bill is that, as under section 4(7) of the 1976 Act, sheriffs will have the full powers which they have in civil proceedings to regulate proceedings at FAIs. It is necessary to make this clear because not all of these powers will be covered in bespoke FAI Rules, for example in fields such as the inherent power of the court to punish contempt.

167. The specific powers are—

- all the powers which a sheriff has in relation to the discharge of his jurisdiction in civil proceedings;
- all the powers which the sheriff has for the discharge of his competence in civil proceedings; and

- all the powers which the sheriff has for giving full effect to his or her decision in civil proceedings, (for example, contempt), or to enforce any other order which they need to make.

168. These powers are subject to rules made for FAIs under the Bill and to the other provisions of the Bill.

#### *Evidence and witnesses*

169. The policy of the Bill is that an FAI is an inquisitorial judicial inquiry held in the public interest. The proceedings are not intended to be adversarial and in particular they are not intended to provide an opportunity for parties to try to establish grounds for subsequent civil litigation. The facts relating to the circumstances of death will continue to be presented to the court at the FAI principally by the procurator fiscal, but participants may also bring forward evidence and witnesses may be cross-examined.

170. In order to permit the sheriff to adopt an inquisitorial role at an FAI, the Bill enables the sheriff to instruct a party to the inquiry (including the procurator fiscal), to lead evidence related to a matter relating to the circumstances of the death which has arisen and on which the sheriff feels that it would be useful to hear more evidence or clarification of evidence which has already been led at the inquiry.

171. The Bill explicitly provides that the rules of evidence which apply in relation to civil proceedings in the sheriff court (but not those for simple procedure) apply in the inquiry, and accordingly hearsay evidence and uncorroborated evidence are both admissible in FAI proceedings as set out in sections 1, 2 and 9(c) of the Civil Evidence (Scotland) Act 1988. It follows that the evidential standard for FAIs is the civil standard of proof – the balance of probabilities.

172. As under the 1976 Act, witnesses are not protected against subsequent criminal proceedings. No witness may, however, be compelled to answer a question which might incriminate them.

#### *Power to conduct inquiry in private*

173. Section 4(3) of the 1976 Act provides that an inquiry will normally be open to the public. The policy of the Bill is that an inquiry, or part of it, may be held in private, but otherwise will usually be held in public. It is expected that the power to hold even part of an FAI in private will be exercised rarely. The Bill does not attempt to list the reasons why it may be necessary to hold all or part of the FAI in private. The reasons may range widely from issues of national security to the need to protect children or other vulnerable persons. For example part of the FAI into the crash of the Chinook helicopter on the Mull of Kintyre was held in private for reasons of national security.

### *Publishing restrictions*

174. The Bill replicates and modernises the prohibition, previously set out in section 4(4) of the 1976 Act, on the publication of material that could identify a child involved in an FAI. The definitions of “publish” and “material” are wide enough to include material now found online.

### *Assessors*

175. The Bill provides an equivalent provision to section 4(6) of the 1976 Act in order that the sheriff can appoint an assessor to provide assistance to the sheriff in relation to that inquiry based on their specialist knowledge or expertise.

### *Expenses*

176. It is not appropriate for expenses to be awarded at the conclusion of FAIs since they are not civil proceedings involving a dispute between parties where expenses follow success or are awarded against a losing party. The policy of the Bill is that no expenses should be capable of being awarded against either the fiscal or a participant at what is a judicial inquiry held in the public interest. If a participant at an inquiry behaves in a vexatious manner at the inquiry, then the sheriff will have robust case management powers to deal promptly with that. For the avoidance of doubt, this does not affect the payment of out of pocket expenses to bereaved families or witnesses at FAIs.

## **Findings and recommendations**

### *The sheriff’s determination*

177. The policy of the Bill is to modernise the law in relation to the determination made by the sheriff at the end of an FAI, and in particular section 6(1) of the 1976 Act, as recommended by Lord Cullen. Sheriffs will be obliged to make findings in relation to the circumstances of the death which is the subject of the FAI. In order that there is no unnecessary delay, sheriffs are obliged to do so as soon as possible after the conclusion of the hearings of the FAI. They must first consider what happened in the case before them, setting out the date, place and cause or causes of the death or any accident which resulted in the death.

178. The second part of the sheriff’s duty relates to the power to make recommendations as to precautions whereby the death which is the subject of the FAI might have been avoided. Lord Cullen specifically recommended the wording of section 6(1)(c) of the 1976 Act should be clarified. This sets out the power of the sheriff to make “reasonable” precautions whereby the death and any accident “might” have been avoided. The Scottish Government does not believe that it was the intention that the interpretation of the word “might” should be construed as “any chance at all no matter how slim”.

179. The Bill therefore requires the sheriff to set out precautions which were not taken before the death which is the subject of the inquiry, but that could reasonably have been taken and might realistically have prevented the death. The reference to precautions which could “reasonably” have been taken is intended to make it clear that it will not matter whether or not the death or accident was foreseeable. There is no intention to establish civil liability. Lord Cullen thought that there was considerable force in the view that the sheriff should employ hindsight when considering recommendations. The use of the word “realistically” is intended to

imply an actual rather than fanciful possibility that the recommendation might have prevented the death.

180. The requirement for the sheriff to also consider any defects in any system of working which contributed to the death or any accident resulting in the death has been interpreted by sheriffs over the years and there is no intention to disturb that case law.

181. Quite separately from the recommendations relating to the death which is the subject of the FAI, the sheriff also, however, has discretion as to whether to make recommendations to prevent deaths in similar circumstances in the future. In accordance with Lord Cullen's recommendations, sheriffs will be able to direct recommendations to specific bodies or individuals and should have a power to direct delivery of the FAI determination to participants at the inquiry and to any relevant body concerned with safety in the industry or activity in relation to which the accident took place.

182. As under the 1976 Act, an FAI determination will continue to be inadmissible in other judicial proceedings. Lord Cullen commented that this was supported by the consideration that the determination does not determine the rights and obligations of anyone.

#### *Dissemination of the sheriff's determination*

183. Copies of determinations will be given by SCTS to the Lord Advocate, each participant at the inquiry, each person to whom a recommendation is addressed in the sheriff's determination and any other person who the sheriff considers has an interest in the recommendation. This last category is intended to ensure that regulatory and safety bodies receive copies of relevant determinations if they have not been participants at the FAI.

184. Sheriffs will, however, be able to stipulate that part of a determination is to be withheld from publication or not to be given to a person – this is, however, not intended to apply to the persons in the preceding paragraph who will receive the full determination in all cases.

185. The Bill replicates the duty on SCTS in section 6(4)(a) of the 1976 to give copies on request of the same documentation related to the FAI to the Scottish Ministers (rather than the Lord Advocate), a Minister of the Crown, any UK Government Department, and the Health and Safety Executive (though the application to the sheriff will now be the notification to the sheriff). Any other person who has an interest in the inquiry may acquire a copy of the determination or of the transcript of the inquiry on payment of a fee as under section 6(5) of the 1976 Act.

186. The duty under section 6(4)(b) of the 1976 Act to inform the Registrar General of the name and last known address of the person who is the subject of the FAI, as well as the date, place and cause of death, is also replicated.

187. SCTS will be required to publish all FAI determinations, subject to appropriate redaction, and it is expected that this will be done by posting on the SCTS website as currently happens with determinations considered by the sheriff to be of public interest or which contain a significant point of law. This will ensure all recommendations are available publicly and can be used to learn lessons.

### *Compliance with sheriff's determination*

188. The reports from coroners' inquests are not legally enforceable. Under schedule 5 of the Coroners and Justice Act 2009 if, in the opinion of the coroner, action should be taken to prevent the occurrence or continuation of such circumstances creating a risk of other deaths, or to eliminate or reduce the risk of death created by such circumstances, the coroner must report the matter to the person who seems to have the power to take appropriate action. That person must make a written response to the coroner, but they are not obliged to comply with the coroner's recommendation and may simply explain why they have not complied. The response is then passed to the Chief Coroner's Office, which can choose to publish a summary or the complete response if it decides to release the response, and/or send the response to any body that may have an interest in the response.

189. This falls short of making a coroner's "recommendation" legally binding and indeed the Ministry of Justice did not consider such a policy. The party to whom the coroner has sent his or her findings will report to the coroner on action they have taken, or intend to take, in the light of the coroner's conclusions, or why they are doing something different. If they are not complying with the coroner's report, they are obliged to explain why not. There is therefore no legal enforceability of recommendations from coroners' inquests in the rest of the United Kingdom, merely an obligation to say what, if anything, has been done in relation to the action identified by the coroner.

190. The policy of the Bill is that any participant in the FAI to whom a sheriff's recommendation is addressed should be obliged to respond to SCTS. The party would not be obliged to comply with the sheriff's recommendation, but they would be obliged to indicate whether or to what extent they had, or intended to, comply with the sheriff's recommendation or, if they did not intend to comply with the sheriff's recommendation, they should give reasons for that non-compliance. This will foster accountability on the part of the recipient for whatever they decide to do in response.

191. The sheriff would thus not be tasked with ensuring compliance with the recommendation – indeed, the sheriff would have no further involvement in the procedure once they have written the determination. It is expected that the sheriff clerk will issue the determination to the parties specified in the Bill.

192. It is proposed that responses to the sheriff's recommendation would be posted on the SCTS website along with the sheriff's determination. It is also intended that the fact that a party had not responded would be noted on the website. This will provide a public record of any follow up to recommendations.

### **Further proceedings**

193. Lord Cullen recommended in Chapter 9 of his Review that it should be open to the Lord Advocate to apply for fresh FAI proceedings in regard to a fatality where he or she is satisfied (a) as to the existence of evidence (i) which was not reasonably available at the time of the original FAI and (ii) which, if available and accepted, would have been likely to affect the determination of the sheriff in regard to one or more of paragraphs (a) to (e) of section 6(1) of

the 1976 Act; and (b) it is in the public interest that such evidence should be considered in such proceedings.

194. While Lord Cullen acknowledged that there was merit in a determination being final, he also accepted that there may be instances (probably rare) where some evidence comes to light which, if it had been heard at the FAI and accepted, would have been likely to have led to a difference in the determination. He commented that it may not be in the public interest that the subject of the original determination should remain unexamined and suggested that there should be a means of examining such new evidence, albeit this should be subject to safeguards to ensure that there are compelling reasons for its use.

195. The policy intention of the Bill is to make it possible to hold fresh FAI proceedings, but only after the sheriff has issued the determination at the original proceedings. The decision to hold fresh proceedings will lie only with the Lord Advocate. As Lord Cullen noted, it would not be appropriate for it to be possible for someone who felt aggrieved by the original determination to instigate new proceedings. The appropriate action for such persons would be to raise an action for judicial review of the original proceedings and/or determination.

196. The basis for fresh proceedings would be the existence of new and material evidence. The Bill makes it clear that the Lord Advocate must consider that the new evidence must make it likely that either the sheriff's findings and/or recommendations in the original determination would have materially different if the evidence had been available at the original inquiry. The Lord Advocate must also consider that it is in the public interest for further proceedings to be held. The definition of "new evidence" is based on section 4(7)(b) of the Double Jeopardy (Scotland) Act 2011.

197. As procurators fiscal acting under the overall supervision of the Lord Advocate have a long standing common law responsibility for investigating deaths in Scotland, it is entirely appropriate that, where the Lord Advocate is considering whether further inquiry proceedings should be held, fiscals should investigate the new evidence which has arisen. The Bill gives procurators fiscal an equivalent power that they have at the initial inquiry to cite witnesses for precognition in relation to further proceedings, with the same sanctions for non-compliance.

198. The intention is that the arrangements for further proceedings will so far as possible mirror those for the original inquiries, but some differences are inevitable. It is expected that the further proceedings will be held in the same sheriffdom as the original hearings, if not necessarily the same sheriff court. Depending on the lapse of time between the original inquiry and the fresh proceedings, it may not be possible for the sheriff who conducted the original inquiry to oversee the further hearings. The sheriff principal will be responsible for allocating the further proceedings to a sheriff, under his or her responsibility for the efficient disposal of business within the sheriffdom. Once the Lord Advocate has decided to hold further proceedings, the procurator fiscal who has been investigating the new evidence will notify the sheriff that such proceedings are to be held, but will provide the sheriff with a copy of the original determination and a brief account of the nature of the new evidence.

199. The sheriff will then make an order for further proceedings and the intention is that the sheriff should have the option of re-opening the original inquiry or requiring a fresh inquiry.

Lord Cullen expressed a preference for re-opening the inquiry since a re-hearing of the whole evidence may be unnecessary. The notice from the procurator fiscal will give a brief account of the new evidence and this should permit the sheriff to identify the parts of the determination which require reconsideration or amplification. It is not intended that the fiscal should tell the sheriff in the description of the new evidence which part of the determination requires to be reconsidered as that is the sheriff's remit. The fiscal is, however, still responsible for presenting the new evidence to the sheriff.

200. Lord Cullen recognised, however, that there may be cases in which so much of the determination is in question that a further FAI is more appropriate. In both cases, however, the determination from the original proceedings will be set aside. Even if, in the case of a re-opened inquiry, the only change to the determination is to record the new evidence led, there will have to be a determination at the end of those proceedings. It would be odd if there was no formal record of the effect of the new evidence on the sheriff's conclusions in the inquiry. Given that the test for re-opening an inquiry is a high one, it seems unlikely, however, that the only change will be to record the new evidence, and it seems right that there should only be one determination after a re-opened or fresh inquiry so that all of the circumstances are considered in one document.

201. If the sheriff decides to hold completely fresh proceedings then the provisions of the Bill will apply as if the inquiry was being held for the first time. When the sheriff makes an order re-opening an inquiry, the order must specify the date and place of the hearing and the preliminary hearing (unless the sheriff dispenses with the latter). Warrant will also be granted for the fiscal and the participants at the inquiry to cite witnesses to attend and give evidence at the re-opened inquiry.

202. After the sheriff makes an order re-opening an inquiry, the procurator fiscal must give notice to the participants at the original inquiry (and any others under section 10 who were entitled to participate but may not have done so) as well as those persons to whom the sheriff may have directed a recommendation. Public notice must also be given of these matters. The matters to be covered in the notice will be the fact that the inquiry is to be re-opened, a brief account of the new evidence provided to the sheriff by the fiscal and the date and place of any preliminary hearing as well as the date and place of the re-opened inquiry.

203. In relation to the requirement in the Bill that a person to whom a sheriff has directed a recommendation should respond to SCTS, this will not apply, in the case of either a fresh or a re-opened inquiry, to a person to whom a recommendation has been addressed where the same recommendation was made at the original inquiry and has been responded to. It is not considered necessary or reasonable to expect such a person to have to respond twice.

204. If a recommendation was made at the original inquiry but no longer appears in the determination following the fresh or re-opened inquiry, then SCTS must take steps to remove either the response made by the person to whom the recommendation was addressed, or, if no response was received, notice of that fact, must be withdrawn from publication. In practice it is expected that this will involve removing the response or the notice from their website, and noting that the original determination no longer applies.

## **Inquiry rules**

205. Lord Cullen recommended that there should be a comprehensive self-contained set of rules for FAIs. He pointed out that at present the rules of evidence and procedure for FAIs are found in three places: the 1976 Act, the 1977 Rules (as amended) and the rules for ordinary civil causes in the sheriff court. He did not think it appropriate that rules applying to ordinary civil actions should apply to FAIs since they may not be compatible with the legislation.

206. It is desirable that much of the procedure of FAIs should be set out in rules rather than primary legislation. While the Bill sets out the framework for FAIs in Scotland, the detail should be provided in rules of court. The powers which are granted by the Parliament to the courts to make rules about FAI procedures require to be updated and supplemented where necessary to ensure that the rules may be kept up to date. The Bill therefore replaces the power to make rules for FAIs in section 7 of the 1976 Act. It gives the Court of Session a broad power to make acts of sederunt concerning the procedure and practice to be followed in FAI proceedings.

207. Without limiting the overall generality of the power granted to the court to make FAI rules regarding procedure and practice, the Bill contains some specific illustrative examples of the sort of matters which are to be regarded as procedure and practice for the purposes of this power, including the conduct and management of FAI proceedings, the forms of documents used, and action to be taken before the FAI commences. The illustrative examples demonstrate a substantial widening of what can be described as practice and procedure for FAIs.

208. The Bill requires the Court of Session to consult with the Scottish Civil Justice Council (SCJC) when making acts of sederunt which were not prepared in draft by the Council. For the next few years, however, the SCJC will be concentrating on reforms under the Courts Reform (Scotland) Act 2014. The Bill therefore enables the Scottish Ministers, by regulations, to make FAI rules until such time as the provisions conferring responsibility on the SCJC and the Court of Session for the making of FAI rules are commenced. The Scottish Ministers are to consult the Lord President and other persons considered appropriate before making any such regulations.

## **Specialist sheriffs and summary sheriffs**

209. The Courts Reform (Scotland) Act 2014 permits the Lord President to designate categories of casework to be dealt with by judicial officers who specialise in that category of case. The 2014 Act did not permit FAIs to be designated as a specialist category and so the Bill makes this distinct provision. The Bill will permit a sheriff principal to designate sheriffs (including summary sheriffs) as specialists in relation to FAIs within his or her sheriffdom. It is considered that the sheriff principal is best placed to decide which sheriffs and summary sheriffs within their sheriffdom are best suited to specialising in FAIs in the light of their previous experience and expertise.

210. In a similar way the Lord President of the Court of Session will be able to designate part-time sheriffs and part-time summary sheriffs as specialists in relation to FAIs.

211. It will still be competent for sheriffs, summary sheriffs, part-time sheriffs and part-time summary sheriffs who are not designated as a specialist in FAIs to conduct an inquiry. This

mirrors the provision in the 2014 Act for specialist categories. Similarly, the sheriff principal must have to have regard to the desirability of allocating an FAI to a specialist.

212. The rationale for the introduction of summary sheriffs under the Courts Reform (Scotland) Act 2014 was that sheriffs are currently dealing with a great deal of straightforward casework which does not merit their attention. The establishment of a third tier of judiciary, summary sheriffs, to deal with such business means that sheriffs will be freed up to devote more time to more complex casework, both criminal and civil. This principle applies equally to FAIs as it does to civil and criminal business in the sheriff court. The intention is that summary sheriffs will conduct FAIs which are expected to be more straightforward and less complex, leaving sheriffs to deal with more complicated cases. Section 37 of the Bill confers competence on summary sheriffs to conduct an FAI.

## **PROCESSES FOR FATAL ACCIDENT INQUIRIES**

### **Crown Office and Procurator Fiscal Service**

#### *Death investigations*

213. The procurator fiscal's investigation involves, some if not all of the following, depending upon the circumstances of the death<sup>14</sup>—

- ingathering of evidence, which includes witness statements submitted by the police and other reporting agencies, and those dictated by medical personnel, etc;
- the need to consider whether criminal proceedings are appropriate;
- receipt and consideration of reports from external agencies. For example: Police Scotland Collision Investigation Reports in road traffic fatalities (normally received no earlier than 8 weeks after the death); Air Accident Investigation Branch (AAIB) (normally received no earlier than 1 year after death); Health and Safety Executive reports; Health board internal reviews; Local authority Social Work Significant Case Reviews;
- instruction of independent expert opinion to consider particular aspects of the circumstances of the death or the care and treatment provided to a deceased;
- precognition of witnesses;
- sharing of information with nearest relatives following significant developments, as appropriate;
- sharing of information as appropriate with external agencies (who may subsequently become interested parties) for example Health Board, Scottish Ambulance Service, Housing Association, whose care or conduct has been the subject of scrutiny by an expert;
- further supplementary expert reports, following sharing of information with external agencies and nearest relatives;
- Reports to Crown Counsel via SFIU National, which may initiate further investigations prior to a decision being made in respect of whether a discretionary

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<sup>14</sup> This list above is not exhaustive, and not necessarily in order

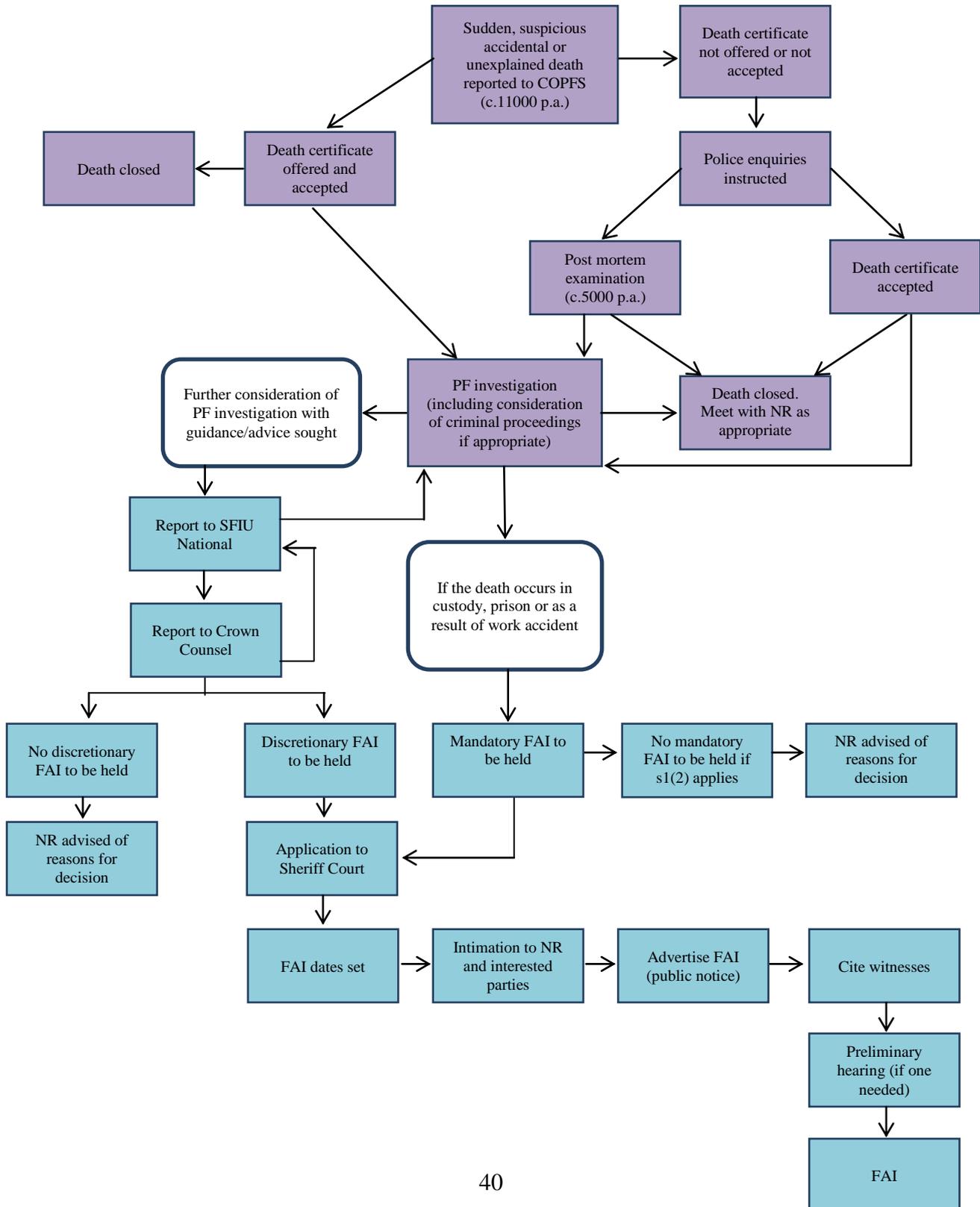
*This document relates to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (SP Bill 63) as introduced in the Scottish Parliament on 19 March 2015*

FAI should be held. SFIU National or Crown Counsel's instruction will always be communicated back to the PF via SFIU National.

*Under current legislation*

This is a simplified illustrative diagram and should be read in conjunction with the Bill. The purple boxes illustrate COPFS' common law duty to investigate sudden, suspicious, accidental and unexplained deaths. The rest of the diagram relates to COPFS' duty to investigate deaths and prepare and lead FAIs under the Fatal Accidents and Sudden Deaths (Scotland) Act 1976.

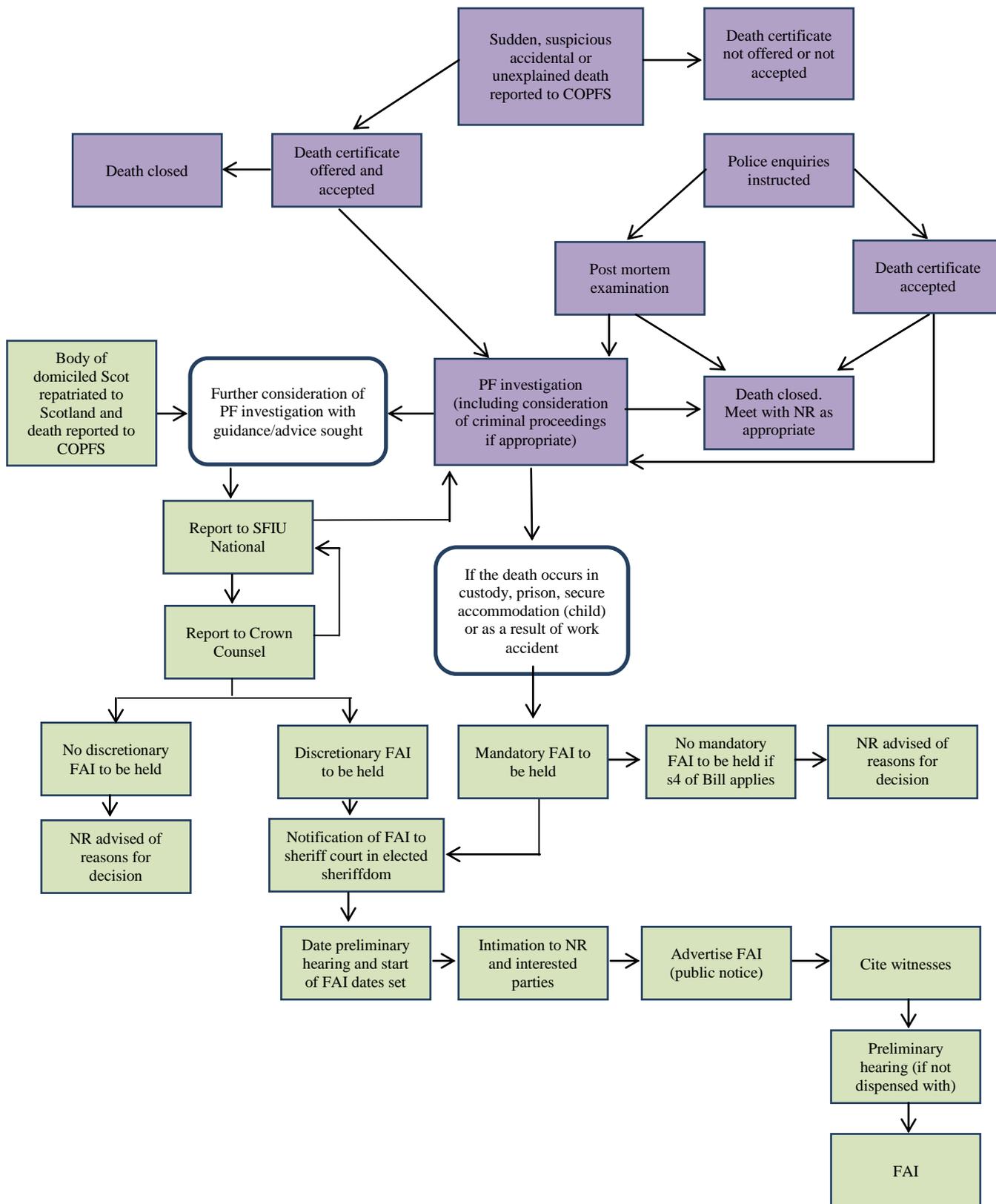
NR = nearest relatives



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*Under proposed Bill*

NR = nearest relatives



## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

214. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website <http://www.scotland.gov.uk/Publications/Recent>.

215. At every stage in the development of the policy underpinning the provisions in the Bill, there has been research and consultation with civil justice partners, key stakeholders and the wider public. From the Review of the Fatal Accident Inquiry Legislation itself and the public consultation published by the Scottish Government to informal discussions with relevant organisations and individuals, policy officials have created an evidence base from which to develop and assess provisions against the equality duty and human rights legislation. Accordingly, the Bill's provisions do not discriminate on the basis of age, disability, sex (including pregnancy and maternity), gender reassignment, sexual orientation, race or religion and belief. To summarise the key results of the EQIA process, all parties are judged to benefit from fewer delays in the system. Based on the lack of evidence available and the absence of concerns raised in the consultation exercises, it is considered that there are no significant impacts on people because of their paternity or pregnancy status, age, race, religion or belief, sex, disability, sexual orientation or transgender status. The Bill will remedy the anomaly that civil partners have not been treated in the same way as spouses in relation to being notified that an FAI is to be held.

216. Overall, the Scottish Government believes that the Bill will provide for a more efficient and effective FAI system where users will experience fewer unnecessary delays. An effective system should benefit, either directly or indirectly, all sections of society.

217. The EQIA identified no negative impacts against the protected characteristics and no changes were required.

### **Island communities**

218. The provisions of the Bill apply equally to all communities in Scotland.

219. It is not expected that there will be any changes to the holding of FAIs at Scotland's island sheriff courts. While the Bill breaks the link between the location of death and the local sheriff court district and permits greater use of alternative accommodation, it is expected that FAIs arising from deaths in remote and rural locations, including the islands, will continue to be held at the local sheriff court in order that bereaved families and witnesses will not have to travel excessive distances.

### **Local government**

220. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities. Any impact on the business of local authorities has been captured in the Financial Memorandum.

221. Local authorities will benefit in the same way as other court users from the reforms in terms of FAIs being dealt with more promptly and efficiently.

### **Sustainable development and environmental issues**

222. The Bill will have no negative impact on sustainable development. There will be a positive effect in that deaths in circumstances similar to those investigated at an FAI may be avoided in the future, thus contributing to sustainable development in that families and businesses will not be disadvantaged by a sudden death.

223. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

### **Human rights**

224. Article 2 of the European Convention on Human Rights is headed “right to life” and its general requirement is that everyone’s right to life must be protected by law. The case law of the European Court of Human Rights has established that Article 2 comprises both a ‘substantive aspect’ – requiring the State to refrain from taking life and to take measures to positively safeguard life – and a ‘procedural aspect’. The procedural aspect is sometimes referred to as the ‘investigative obligation’ and requires the State to provide for an independent, impartial and effective official investigation into deaths in certain circumstances. The application of Article 2 is fact-sensitive to individual cases but Article 2 will be particularly relevant where there is the appearance of State responsibility or complicity in a death (for example where an individual dies in prison or otherwise in State custody) or where there are suspicious or unusual circumstances.

225. The Bill makes a significant positive contribution to the realisation in Scotland of the procedural element of Article 2 rights by providing for mandatory FAIs in certain cases (including by reference in section 2 to an expanded definition of “legal custody”) and discretionary FAIs in other cases (in the circumstances referred to in section 4). Article 2 requirements, including requirements as to promptness and reasonable expedition which are also fact specific for each investigation, are directly applicable on the Lord Advocate and procurators fiscal.

226. However it is important to note that the Article 2 procedural aspect may be realised in Scotland by other means such as the types of proceedings distinct to a FAI referred to in section 3(2). Further, Article 2 is realised in Scotland by systems of general application such as an effective criminal and civil justice system (for example damages actions for wrongful deaths), the regulation of dangerous activities, and high ethical and professional standards in the field of medicine.

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

## **POLICY MEMORANDUM**

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

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## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

### **CONTENTS**

As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill introduced in the Scottish Parliament on 19 March 2015:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government statement on legislative competence; and
- the Presiding Officer's statement on legislative competence.

A Policy Memorandum is published separately as SP Bill 63–PM.



## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

3. The Bill seeks to modernise the legislative framework for Fatal Accident Inquiries (FAIs) in Scotland. The provisions in the Bill take forward many of the recommendations requiring primary legislation from Lord Cullen's Review of the operation of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 ("the 1976 Act"), which reported in 2009<sup>1</sup>. The Scottish Government issued its response to the review in 2011<sup>2</sup>, accepting the majority of Lord Cullen's 36 recommendations.
4. The recommendations from Lord Cullen which were addressed to the Crown Office and Procurator Fiscal Service (COPFS) have already been taken forward by the establishment of the Scottish Fatalities Investigation Unit (SFIU).
5. The Bill will implement the remaining recommendations that the Government accepted in its response in 2011. A public consultation<sup>3</sup> on the proposals of the Bill was carried out from 1 July to 9 September 2014 and responses published<sup>4</sup> on 15 October 2014.
6. The Bill will repeal the 1976 Act and enact new provisions to govern the system of FAIs in Scotland. The Bill does not attempt to legislate for all of the recommendations made by Lord Cullen that were accepted by the Government. Some of the changes recommended will be implemented by the Lord President and the Scottish Courts and Tribunal Service (SCTS). Other changes will be implemented through FAI Rules to govern the procedure. The Bill seeks to set out the framework within which the rules will add the necessary detail.
7. For the purposes of this document, the term FAI will be used to describe an inquiry under the 1976 Act and this Bill.

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<sup>1</sup> Lord Cullen, Report of findings of Review of Fatal Accident Inquiry Legislation:  
<http://www.scotland.gov.uk/Publications/2009/11/02113726/0>

<sup>2</sup> Scottish Government, Response to the Recommendations from the Review of Fatal Accident Inquiry Legislation:  
<http://www.scotland.gov.uk/Publications/2011/03/18150120/0>

<sup>3</sup> Consultation on proposals to reform Fatal Accident Inquiries legislation:  
<http://www.scotland.gov.uk/Publications/2014/07/6772>

<sup>4</sup> Responses to the consultation on proposals to reform Fatal Accident Inquiries legislation:  
<http://www.scotland.gov.uk/Publications/2014/10/8764>

8. The Bill is in 41 sections and 2 schedules.
9. Section 1 sets out the nature and purpose of an inquiry under the Bill, with sections 2 to 7 describing the situations where an inquiry must or may be held.
10. Section 8 provides for the Lord Advocate on request to explain to close relatives and partners why an inquiry is not to be held.
11. Sections 9 to 13 make general provision, firstly, relative to the procurator fiscal's investigation (section 9), then for who may participate in an inquiry (section 10), thirdly, for the location of the inquiry and the jurisdiction of the sheriff (sections 11 and 12), and lastly for inquiries into multiple deaths (section 13).
12. Sections 14 to 17 provide for the procedure that precedes the inquiry proper. This includes the procedure for initiating the inquiry (section 14) and for giving notice of it (section 16), provision for preliminary hearings (section 15), and provision for the agreement of undisputed facts between the procurator fiscal and the participants (section 17).
13. Sections 18 to 24 provide for the inquiry itself. This includes provision relating to the powers of the sheriff (section 18), provision about evidence and witnesses (section 19), a requirement that the inquiry be held in public (section 20), and publishing restrictions and offences relating to those restrictions in relation to the identification of children (sections 21 and 22). Section 23 permits a sheriff to appoint a person (known as an assessor) to assist him/her. Finally, section 24 prohibits the sheriff from awarding expenses in relation to the proceedings.
14. Sections 25 to 27 provide for the sheriff's findings, dissemination of his/her determination, and compliance with any recommendations.
15. Sections 28 to 33 make provision for the circumstances in which there might be further proceedings and the procedures for those. Section 31 makes provision where these further proceedings are to be a re-opening of the original inquiry and section 32 where they are to be a fresh inquiry.
16. Section 34 provides for the Court of Session to make rules relating to procedure, schedule 1 (which is introduced by subsection (6)) makes provision in relation to the functions of the Scottish Civil Justice Council and sets out transitional provisions relating to the making of rules. Section 35 makes provision for the designation of specialist judicial officers in relation to FAIs.
17. Finally, sections 37 to 41 make general provision in relation to the Bill and schedule 2 lists modifications of existing legislation.

## **COMMENTARY ON SECTIONS**

### **Inquiries into certain deaths**

#### *Section 1- Inquiries under this Act*

18. Subsection (1) provides that where an FAI is to be held into a death, it is the duty of the procurator fiscal to investigate the death, and arrange for an FAI to be held into it. Subsection (2) provides that the FAI is to be conducted by a sheriff (this may include a sheriff principal) as defined in subsection (5)(b). Subsection (3) makes it clear that the purpose of an FAI is to establish the circumstances of the death and to consider whether any precautions could be taken which may prevent other deaths in similar circumstances. Subsection (4) makes it clear that it is not the purpose of FAIs to establish civil or criminal liability. They are not adversarial hearings and are not designed to be like civil litigation. Nor have they any connection to criminal proceedings. The definition of sheriff in subsection (5)(b) means that when the Bill refers to sheriff it is referring to a sheriff of the sheriffdom in which the FAI is, or is to be, held. Section 12 makes provision about where the FAI is to be held. The powers of the sheriff can also be exercised by a summary sheriff, given the effect of section 36 of the Bill, and the reference to sheriff also includes the sheriff principal given the effect of section 134(2) of the Courts Reform (Scotland) Act 2014.

### **Inquiries into deaths occurring in Scotland**

#### *Section 2 - Mandatory inquiries*

19. Section 2 sets out the circumstances in which an FAI is mandatory. Under subsection (3) an FAI is mandatory if the person died in Scotland as a result of an accident in Scotland, in the course of the person's employment or occupation. This replicates the effect of section 1(1)(a)(i) of the 1976 Act.

20. Under subsection (4) an FAI is mandatory if the person has died in Scotland and was in legal custody, or was a child required to be kept or detained in secure accommodation. 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.

21. Subsection (5) defines "legal custody". This includes being imprisoned or detained in a penal institution, being in police custody, being held in custody on court premises or being detained in service custody premises. The definition of police custody takes its meaning from the Criminal Justice (Scotland) Bill currently at stage 2 before the Parliament. The reference to court custody includes the death of any person in the court cells or the court building, which may be separate from police custody or occur after the end of police custody. A death of a person required to be detained in premises used by the armed forces as service custody premises continues to be included as before restating reserved law in this regard.

22. The inclusion of a death of a child required to be kept or detained in secure accommodation is an addition to the mandatory categories in the 1976 Act. "Child" is defined in section 38 as a person who has not yet reached the age of 18 and secure accommodation takes its definition from regulations made under the Public Services Reform (Scotland) Act 2010, thus

keeping pace with any change to the meaning of such accommodation which may occur from time to time.

23. By providing that an FAI is to be held in these circumstances, the effect of this section is to require the procurator fiscal to investigate the circumstances of the death and arrange for a FAI to be held.

*Section 3 – Mandatory inquiries: exceptions*

24. This section allows the Lord Advocate to decide that an FAI is not to be held into a death which falls within the categories of death set out in section 2 (mandatory inquiries). The Lord Advocate can exercise this discretion only if satisfied that the circumstances of the death have been sufficiently established in the course of certain other proceedings.

25. The other proceedings which the Lord Advocate is permitted to rely upon are criminal proceedings, an inquiry under section 17(2) of the Gas Act 1965, an inquiry under section 14(2A) of the Health and Safety at Work etc. Act 1974, an inquiry under section 85(1) of the Energy Act 2013 and, except in the case of a death of a person required to be detained in service custody premises, an inquiry under section 1 of the Inquiries Act 2005. Inquiries under the 2005 Act are public inquiries into events that have caused or have potential to cause public concern, examples include inquiries into a particular event (eg Dunblane inquiry 1996) or a series of events (eg BSE inquiry 1997). They are held at the instigation of UK or Scottish Government Ministers with the aim of helping to restore public confidence in systems or services by investigating the facts, which may include why matters may have been dealt with in a particular way over the course of many years and making recommendations to prevent recurrence, not to establish liability or to punish anyone. By comparison, FAIs provide a local inquiry into the circumstances of a death and consider what steps might be taken to prevent deaths in similar circumstances.

26. Currently, section 1(2) of the 1976 Act makes provision for the interaction between deaths that are subject to a mandatory inquiry and criminal proceedings. In relation to other inquiries, currently separate provision is made in section 17(4) of the Gas Act 1965, section 14(7) of the Health and Safety at Work etc. Act 1974 and section 85(7) and (8) of the Energy Act 2013, which state that an FAI is not to be held where a death has already been investigated in an inquiry under those Acts, unless the Lord Advocate directs otherwise. In relation to the Inquiries Act 2005, there is currently no provision which allows the Lord Advocate to take into account that the circumstances of the death requiring a mandatory FAI have been established during the course of an inquiry under the 2005 Act. For inquiries under the various statutory provisions noted above, the Bill therefore shifts the emphasis from there being no FAI unless the Lord Advocate directs, to the Lord Advocate having discretion to direct that there will be no FAI. So if the discretion is not exercised the result under the Bill is that (if the circumstances are within section 2(3) or (4)) there will be an FAI. The Bill also brings the relevant interactions with mandatory inquiries and other inquiries within fatal accident legislation, making it easier to access. Insofar as these provisions modify the law on reserved matters they effect a restatement (see also the Explanatory Note to schedule 2).

27. In summary, this section permits the Lord Advocate to decide that the circumstances of the death have been sufficiently established in certain specified proceedings and therefore no FAI is necessary. If the circumstances have not been established then an inquiry must be held. But

the Bill also permits the Lord Advocate to decide that even where the circumstances have been established, an inquiry could still be held. There may be deaths where the Lord Advocate may conclude that even though the circumstances have been established, the public interest demands that a sheriff should consider whether recommendations should be made in the public interest as to how deaths in similar circumstances might be avoided in the future.

#### *Section 4 – Discretionary inquiries*

28. Section 4 reproduces the effect of section 1(1)(b) of the 1976 Act to give the Lord Advocate discretion to require an inquiry to be held into a death in Scotland if they consider that the death was sudden, suspicious or unexplained or occurred in circumstances which give rise to serious public concern, and that it is in the public interest to do so. Subsection (2) provides that the power to hold discretionary inquiries does not apply to a death where a mandatory inquiry is required.

#### *Section 5 – Certain deaths and accidents to be treated as occurring in Scotland*

29. Section 5 reproduces the effect of section 9 of the 1976 Act as a restatement of reserved law. Section 5 operates to ensure that a death or accident is to be treated as having occurred in Scotland if it was connected to certain activities related to the offshore oil and gas industry and took place within the area of sea adjacent to Scotland which is treated as being subject to Scottish civil law. The Bill does this by defining the activities and areas regulated by reference to section 11(2) of the Petroleum Act 1998, with the effect that those activities and that area subject to section 11(2) are also covered by the Bill.

### **Inquiries into deaths occurring abroad**

#### *Section 6 – Inquiries into deaths occurring abroad: general*

30. Section 6 permits an FAI to be held into a death of a person ordinarily resident in Scotland, if it occurs outwith the United Kingdom and the body is repatriated to Scotland (subsection (1)). Until now it has only been possible to hold an FAI into a death which occurred in Scotland (other than the deaths of service personnel). Section 6 does not apply to deaths in England, Wales and Northern Ireland as such deaths will continue to be subject to the system of coroners' inquests in those countries (see the use of the words "outwith the United Kingdom" in subsection (1)(a)). The effect of subsection (2) is that this section does not apply to deaths of service personnel abroad, which are dealt with in section 7.

31. Subsection (3) sets out the criteria for the Lord Advocate's discretion to decide if an FAI should be held into such a death. As for other discretionary FAIs, the Lord Advocate will consider whether the death was either sudden, suspicious or unexplained, or occurred in circumstances giving rise to serious public concern. The Lord Advocate must also consider whether the circumstances of the death have already been established in the course of an investigation by the appropriate authorities in the country where the death occurred, and whether there is a real prospect that those circumstances would be sufficiently established in a FAI. The FAI will only be held if the Lord Advocate decides that it is in the public interest to investigate the circumstances of the death. An FAI into a death within this section will proceed in the same way as any other FAI under the Bill.

*Section 7 – Inquiries into deaths occurring abroad: service personnel*

32. Section 7 re-enacts section 1A of the 1976 Act which was inserted by section 12 of the Coroners and Justice Act 2009. Those provisions were inserted following a Legislative Consent Resolution passed by the Scottish Parliament on 21 May 2009<sup>5</sup> and accordingly the Scottish Government's position is that elements of section 7 restate reserved law. Section 12 permits the Secretary of State or the Chief Coroner to notify the Lord Advocate if it is considered that it is appropriate for the death abroad of armed forces service personnel, or of a civilian subject to service discipline who was accompanying service personnel who were engaged in active service, to be the subject of an FAI rather than a coroner's inquest. This will normally be where the deceased was domiciled in Scotland.

33. Section 7 of the Bill makes provision for an FAI to be held into such a death if it occurs while the person is in legal custody, or is sudden, suspicious or unexplained, or occurs in circumstances giving rise to serious public concern. This includes a death abroad whilst detained abroad in premises analogous to service custody premises as defined under the Armed Forces Act 2006.

34. An FAI will be held if the Lord Advocate decides that it will be in the public interest so to do. Subsection (4) means that no inquiry can be held if the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established in criminal proceedings. An FAI into a death within this section will proceed in the same way as any other FAI under the Bill.

**Reasons where inquiry not held**

*Section 8 – Reasons for decision not to hold an inquiry*

35. Under section 8, where it is decided that an FAI is not to be held, the Lord Advocate must give reasons (in writing) for that decision. This duty only applies where the request is made by the spouse or partner (civil or cohabiting) or nearest relative of the deceased and the Lord Advocate is only required to respond to these persons. This reflects COPFS' current practice and would cover situations such as when the Lord Advocate decides that an FAI should not be held in terms of section 4. Paragraph (b) includes a same sex couple living together.

**Procurator fiscal's investigation**

*Section 9 – Citation of witnesses for precognition*

36. It will sometimes be necessary for the procurator fiscal to precognosce witnesses as part of a death investigation prior to determining whether there are to be further proceedings. Section 9 replicates section 2 of the 1976 Act to enable the citation of witnesses for precognition as part of that death investigation. Subsection (5) makes it an offence to fail to comply with an order made by the sheriff requiring a person to attend for precognition and subsection (6) sets out the penalty if convicted of that offence.

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<sup>5</sup> For details of the legislative consent process see <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16067.aspx>.

## **Participants**

### *Section 10 – Persons who may participate in the inquiry*

37. Section 10 specifies the people who may participate in an FAI in addition to the procurator fiscal. The provisions in this section have been updated to capture modern relationships as the 1976 Act does not include civil or cohabiting partners. There may be circumstances where the deceased may not have been living with a spouse or civil partner at the time of death and may instead have been cohabiting with another person. This provision gives a cohabitee in such circumstances the right to participate in the FAI. The Bill's description in section 10(1)(b) of a person living with A as if married to A at the time of A's death will include a same sex couple living together.

38. The provisions preserve the effect of section 4(2) of the 1976 Act providing that, where the inquiry concerns a death at work, an inspector appointed under section 19 (appointment of inspectors) of the Health and Safety at Work etc. Act 1974 may also be a participant if he or she so chooses. In that limited regard, the Bill restates reserved law.

## **Location**

### *Section 11 – Places at which inquiries may be held*

39. The Scottish Ministers will be able to make regulations under section 11 to designate places at which a sheriff court may be held for the purposes of holding an FAI. Subsection (1) makes it clear that these places will be additional to the places already designated for the holding of sheriff courts under the Courts Reform (Scotland) Act 2014. "Places" in this sense means the towns and cities where sheriff courts are held – it does not mean specific sheriff court buildings as FAIs have already been held in other buildings.

40. An FAI may be held at a sheriff court building, but it may also be held in another building in a place designated under the 2014 Act or section 11 of the Bill. This allows the current practice of holding FAIs in buildings not usually used for court purposes (e.g. locations such as the Council Chamber in, for example, Aberdeen City Chambers and the Maryhill Community Centre in Glasgow, or in places where there is no sheriff court (e.g. Motherwell)).

41. Since the SCTS has the statutory responsibility for providing property for the Scottish courts under section 61(1) of the Judiciary and Courts (Scotland) Act 2008, the Scottish Ministers will only make regulations under subsection (1) following the submission of a proposal by SCTS – with the agreement of the Lord President – for the designation of a place for the holding of FAIs under subsections (2) and (3). However, this procedure will be subject to consultation with appropriate persons under subsection (4).

42. In making the regulations, the Scottish Ministers are to have regard to the SCTS proposal under subsection (5). Given the statutory responsibility which the Lord President has for the efficient disposal of business in Scotland's courts under section 2(2) of the 2008 Act, and the equivalent responsibility of the SCTS set out above, the Scottish Ministers must obtain the consent of both the Lord President and the SCTS under subsection (6) before making those regulations. This power is subject to affirmative procedure.

*Section 12 – Jurisdiction in relation to inquiries*

43. Section 12(1) provides that an FAI may be held in any sheriffdom in Scotland regardless of the place of the death or (if applicable) any accident causing the death. This removes the requirement of a close connection between the place most closely connected with the circumstances of the death and the procurator fiscal for the sheriff court district relating to that place that is provided by section 1 of the 1976 Act. This will allow greater flexibility in the system of FAIs which may allow inquiries to be held more quickly if they can be accommodated in alternative accommodation. This flexibility still permits an FAI to be heard locally in relation to the circumstances of the death, however, and indeed it is expected that the majority of FAIs will be held in the same sheriffdom as the place of death.

44. Subsection (2) allows the Lord Advocate to choose in which sheriffdom the FAI is to be held, after consulting with the SCTS. It does not allow the Lord Advocate to choose the place or building within the sheriffdom where the FAI will be held, which will be a matter for discussion between the Lord Advocate (who will have been in contact with any relatives of the deceased), the sheriff principal and the SCTS. Ultimately the decision is for the sheriff principal under his or her powers relative to the efficient disposal of business contained in the Courts Reform (Scotland) Act 2014.

45. Subsections (3) and (5) allow the sheriff to transfer the FAI to another sheriffdom, but only after the procurator fiscal and the participants have been given an opportunity to make representations about such a transfer and only with the consent of the sheriff principal for that sheriffdom and the sheriffdom to which the FAI is to transfer. The transfer order may be made at the sheriff's own initiative or at the instigation of the procurator fiscal or one of the participants at the FAI.

## **Inquiries into multiple deaths**

*Section 13 - Inquiry into more than one death*

46. Section 13 permits a single FAI to be held into multiple deaths if they are as a result of the same accident or occur in the same or similar circumstances. The 1976 Act only allows inquiries into multiple deaths that occur in the same sheriffdom. This provision, along with section 12, means that one FAI may take place into multiple deaths regardless of the place where the deaths took place.

## **Pre-inquiry procedure**

*Section 14 - Initiating the inquiry*

47. An inquiry is only to be held where the Lord Advocate makes a decision to that effect or where the Bill requires one to be held on a mandatory basis. Section 14 provides that where an inquiry is to be held, the procurator fiscal is to give notice to the sheriff of that fact. The procurator fiscal is also required to give the sheriff a brief account of the circumstances of the death so far as they are then known to the procurator fiscal, together with any other information which may be set out as required in FAI rules made by act of sederunt under section 34(1) of the Bill. Under subsection (2), the sheriff will set out in an order the date and place for the preliminary hearing to the FAI if one is to be held, and for the FAI itself, which need not be held at the same place. The sheriff will also grant warrant for the procurator fiscal and participants to cite witnesses.

48. Subsection (3) provides flexibility for the sheriff to not fix a date and place for the hearing, but only if a preliminary hearing is to be held and the sheriff considers it appropriate not to fix such a date. It is left to the discretion of the sheriff as to the circumstances in which it is not appropriate to fix a date; it may be that at this early stage the sheriff is unsure as to the scope of the FAI and may wish to hear submissions prior to fixing the date.

49. Subsection (4) allows the sheriff to vary a date and place fixed for the holding of a preliminary hearing or inquiry.

50. Subsection (5) makes it clear that, in deciding the date for the holding of the FAI, the sheriff must have regard to the desirability of holding the inquiry as soon as is reasonably practicable. This means that the sheriff must bear in mind the need to hold the inquiry soon, and while the inquiry need not be held immediately, that only practical aspects which require a delay be taken into account (such as available accommodation and reasonable time for participants to prepare) when choosing a date.

#### *Section 15 – Preliminary hearings*

51. Section 15 requires a preliminary hearing to be held before every FAI unless the sheriff dispenses with that requirement in accordance with rules made in an act of sederunt under section 34(1). The sheriff is given further power to reverse a decision not to hold a preliminary inquiry.

52. Further provision is to be made with regard to the content and purpose of preliminary hearings in rules made in an act of sederunt under section 34(1). The purpose of a preliminary hearing for an FAI is to consider the likely length of the proceedings, the state of preparedness of participants and the procurator fiscal, the amount of evidence and any areas for agreement of uncontroversial facts, and anything else that needs to be addressed before the inquiry proceedings can begin.

#### *Section 16 – Notice of the inquiry*

53. Once the date and location of the preliminary hearing and/or FAI hearing is fixed (in accordance with the sheriff's powers under section 14), then section 16 places a duty on the procurator fiscal to notify those persons who the procurator fiscal considers to be persons who are entitled to participate in the FAI. Those who are entitled to be participants are set out in section 10. In addition, the procurator fiscal is also required to notify any person specified in FAI rules or in a category of person specified in FAI rules made in an act of sederunt under section 34(1). Subsection (3) provides that the procurator fiscal will also have to provide public notice of the FAI, the date and place of any preliminary hearing, and the date and place of the FAI.

54. The procurator fiscal is under a continuing duty to notify and publicise changes to the place or date of these matters, including notification of a preliminary hearing where the sheriff has reversed his or her decision not to hold one. For the avoidance of doubt, the procurator fiscal only has to notify directly those who appear to the procurator fiscal to be entitled to participate or whom he or she has to notify under FAI rules.

*Section 17 – Agreement of facts before an inquiry*

55. Section 17 provides that FAI rules will make provision about the agreement, before the start of the inquiry, by the procurator fiscal and the participants in an inquiry of uncontroversial facts which are unlikely to be disputed. This is to avoid the need for evidence to be led at the FAI about issues which are not in doubt and thus contribute to shortening the FAI. FAI rules are likely to set out the process by which agreement is to be reached, and include a duty to seek agreement.

**The inquiry**

*Section 18 - The powers of the sheriff*

56. Section 18 makes it clear that sheriffs have all of the inherent powers that they have as a judge in civil proceedings in relation to an FAI. This does not make an FAI a form of civil proceedings. Such inherent powers are, however, subject to the other provisions in the Bill or provision made by FAI rules by virtue of subsection (2).

*Section 19 – Evidence and witnesses*

57. Section 19 sets out that the procurator fiscal must bring forward evidence relating to the circumstances of the death at the inquiry and that participants may also bring forward such evidence. The Bill does not regulate the procedure to be followed or the way in which evidence is led and further details on that may be provided in rules. In addition, subsection (2) enables the sheriff to instruct a participant in the FAI or the procurator fiscal to lead evidence on any matter relating to the circumstances of the death. The sheriff is not, therefore, dependent upon the procurator fiscal nor the participants with regard to what evidence is led. An FAI is an inquisitorial judicial inquiry held in the public interest and empowering the sheriff in this way is in keeping with the aims of the process.

58. Subsection (3) applies the rules of evidence that apply in civil proceedings to FAIs. This continues the approach in section 4(7) of the 1976 Act and, accordingly, evidence that has not been corroborated and hearsay evidence are both admissible in FAI proceedings (as set out in sections 1, 2, and 9(c) of the Civil Evidence (Scotland) Act 1988). It follows that the evidential standard for facts to be proven for FAIs is the civil standard of proof – the balance of probabilities.

59. Subsection (4) makes it clear that subsection (3) is subject to any provision made in rules in an act of sederunt under section 34(1).

60. Subsections (5) and (6) restate section 5 of the 1976 Act. These subsections make clear that, where a witness is questioned, that does not mean that subsequent criminal proceedings may not then be taken against that person. Further, if a question is put to a witness the answer to which could show the witness was guilty of an offence, that witness is not required to answer that question.

*Section 20 – Inquiry to be conducted in public*

61. Section 20 provides that an FAI should normally be open to the public. However subsection (2) allows the sheriff to order that an inquiry, or part of it, is to be held in private.

The sheriff can make this order if the procurator fiscal or one of the participants applies for it, or may do so on his or her own initiative. The circumstances in which an FAI may be held in private have been left to the discretion of the sheriff, as the reasons may range widely from issues of national security to the need to protect children or other vulnerable persons.

*Section 21 – Publishing restrictions in relation to children*

62. Section 21 allows the sheriff to prohibit publication of material that could identify a child involved in an FAI. “Child” now means a person who has yet to reach the age of 18 years. The prohibited material which may lead to identification of the child includes, but is not limited to, the items listed in subsection (3). Under subsection (4), the sheriff may make such an order on his or her own initiative or on the application of the procurator fiscal or a participant in the FAI. Failure to comply with the sheriff’s order will constitute an offence under subsection (5), the penalty for which is set out in paragraph (6). The Bill recognises that some of those involved in the process of publishing, such as a newspaper distributor or retailer, may not be aware that the content of the publication is in breach of such an order and provides for a defence. The definitions of “publish” and “material” in subsection (8) are wide and include material published online. The Scottish Government proposes that the Order under section 104 of the Scotland Act 1998 referred to in the Policy Memorandum will extend the effect of publishing restrictions to England and Wales and Northern Ireland.

*Section 22 – Offences by bodies corporate etc.*

63. Section 22 applies where the publication offence in section 21(5) is committed by bodies such as companies, partnerships and unincorporated associations (e.g. a club). This provision allows for natural persons who have an element of control over such bodies (e.g. a director or partner (as set out in subsection (3)) also to be held criminally liable and to be fined in certain circumstances.

*Section 23 – Assessors*

64. Under section 23, the sheriff can appoint an assessor to provide assistance to the sheriff in relation to that FAI based on the assessor’s specialist knowledge or expertise.

*Section 24 – Expenses*

65. This provision expressly removes any power of the court to award legal expenses in an FAI. The effect of this section is unconnected with the payment of the expenses of witnesses etc. about which rules may be made in an act of sederunt under section 34(1).

66. The decision to hold an FAI is taken by the Lord Advocate acting in the public interest. The rule making power in the Bill will permit rules to be made to give sheriffs sufficient case management powers to be able to deal with vexatious behaviour as it arises without the need to award expenses. For example, FAI rules will greatly empower the sheriff to control proceedings through the use of minutes of agreed evidence, powers to regulate the conduct and management of proceedings and the regulation of witnesses and evidence.

## **Findings and recommendations**

### *Section 25 – The sheriff’s determination*

67. Section 25 provides for the determination made by the sheriff at the end of an FAI. Subsection (1) modernises what is currently set out in section 6(1) of the 1976 Act as recommended by Lord Cullen. The sheriff must make findings in relation to the circumstances of the death as set out in subsection (2), and has discretion as he or she considers appropriate, whether to make recommendations about steps which might realistically prevent deaths in similar circumstances in the future (as set out in subsection (4)).

68. Subsection (2) specifies the circumstances of the death or facts which must be set out in the determination, i.e. it looks back at what happened in the particular case. Subsection (2)(a) to (d) replicates section 6(1)(a) and (b) of the 1976 Act.

69. Subsection (2)(e) requires the determination to set out any precautions which were not taken before the death which is the subject of the FAI, but that could reasonably have been taken and might realistically have prevented the death. The precautions that the sheriff identifies at this point relate to the death which is the subject of the FAI and might not be the same as those recommended to prevent other deaths in the future under subsection (4)(a). In subsection (2)(e)(i), “reasonably” relates to the reasonableness of taking the precautions rather than the foreseeability of the death or accident. A precaution might realistically have prevented a death if there is a real or likely possibility, rather than a remote chance, that it might have so done.

70. Subsection (2)(f) is based on section 6(1)(d) in the 1976 Act. It allows the sheriff to make findings about any defects in a system of working which contributed to the death or an accident resulting in the death.

71. Subsection (2)(g) allows the sheriff to make findings about any other facts which are relevant to the circumstances of the death.

72. Subsection (3) provides that, for the purpose of identifying precautions that might have been taken, it does not matter whether it was foreseeable before the death or accident that the death or accident might occur if the precautions were not taken. Subsection (3) also provides that it does not matter, for the purpose of identifying defects in a system of working, whether or not if it was foreseeable that the death or accident might have occurred as a result of those defects. This makes it clear that the sheriff may employ hindsight when considering these findings, and further distinguishes an FAI from civil litigation.

73. Subsection (4) sets out the matters about which the sheriff may make recommendations, i.e. it looks forward to the prevention of similar deaths in the future. These matters are the taking of reasonable precautions, the making of improvements to, or introduction of, a system of working, or the taking of any other steps that might realistically prevent future deaths in similar circumstances. Again, there must be a real or likely possibility that the matters recommended may prevent other deaths in similar circumstances, rather than a remote chance that a similar death in the future might be prevented.

74. Subsection (5) allows the sheriff to address a recommendation to a participant or a body or office-holder with an interest in the prevention of deaths in similar circumstances to those in which the death occurred.

75. Subsection (6) provides that an FAI determination is inadmissible in evidence and cannot be founded on in other judicial proceedings. This reproduces the effect of section 6(3) of the 1976 Act. 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 civil proceedings. It is not the purpose of the FAI to establish liability. If liability arises from the death, then a civil case is the forum in which such matters are to be examined.

*Section 26 - Dissemination of the sheriff's determination*

76. Section 26 confers duties on SCTS to publish and disseminate an FAI determination once it has been made by the sheriff.

77. Subsection (1)(a) requires the SCTS to publish all FAI determinations in such manner as it considers appropriate, but it is expected that this will be done by posting on the SCTS website. Subsection (1)(b) requires SCTS to issue a copy of the determination to the Lord Advocate, participants at the FAI, any person to whom a recommendation has been addressed and anyone else who may have an interest in any recommendation made.

78. Subsections (2) and (3) replicate the effect sections 6(4)(a) and (5) of the 1976 Act respectively. Subsection (2) obliges SCTS on request to send to the people and bodies listed there: a copy of the determination, the notice given by the procurator fiscal which initiated the FAI, any transcript of the evidence which was taken and any report or documentary production used in the FAI. Subsection (3) obliges SCTS to give to any other person, if requested and on payment of a fee to be set out in the FAI rules, a copy of the determination, or, if the person has an interest in the inquiry and makes the request within a timeframe set out in rules, any transcript of the evidence at the inquiry.

79. There may, however, be cases where persons should not receive all the details (for example cases involving children where identities may be irrelevant to the recipients). Subsection (5) provides that the sheriff may decide that part of the determination should not be published or should not be given to a person. It is expected that the determination will be treated in the same way as any other sensitive court judgement. The subsection gives the sheriff flexibility to redact where he or she thinks fit and in line with SCTS policy, but only in accordance with provision made in the FAI rules.

80. Subsection (6) provides that the procurator fiscal must, after the determination has been issued, advise the Registrar General of Births, Deaths and Marriages for Scotland of the date, place and cause death and the deceased's name and last known address. This replicates the effect of section 6(4)(b) of the 1976 Act.

*Section 27 – Compliance with sheriff’s recommendations*

81. Subsection (1) obliges a person to whom a sheriff has made a recommendation to provide SCTS with a written response to that recommendation if he or she was a participant in the inquiry. In any other case, the person may choose to respond.

82. Under subsection (2) the respondent must state—

- what the respondent has done or proposes to do in response to the sheriff’s recommendation; or
- if the respondent has not done and does not intend to do anything in response to the recommendation, their reasons for that.

83. Under subsection (3), the respondent should reply within eight weeks of receipt of a copy of the determination. If the person does not respond to the determination with that period, there will be no sanction as such – the incentive for parties to respond would be that a lack of response or lack of good reasons for not implementing the recommendation would become public knowledge, thus promoting accountability and transparency. A person responding will have the opportunity to make representations to SCTS that part of the response should be withheld (subsection (4)).

84. SCTS will publish the response alongside the original determination, subject to such redaction as considered appropriate taking into account any representations from the respondent and any other reason (such as data protection law). If no response is received, SCTS will publish a note to that effect alongside the original determination (subsection (5)(b)).

**Further inquiry proceedings**

*Section 28 – Circumstances in which there may be further proceedings*

85. Section 28 makes provision for the circumstances in which there may be further proceedings under the Bill in relation to a death. This is a new power conferred on the Lord Advocate, which was not provided for in the 1976 Act.

86. Subsection (1) provides that, after an inquiry has ended, there may only be further inquiry proceedings in accordance with subsection (2).

87. Subsection (2) sets out the test for holding further FAI proceedings. The Lord Advocate may decide that there are to be further proceedings if there is new evidence in relation to the circumstances of the death, and the Lord Advocate considers that it is highly likely that any of the sheriff’s findings and/or recommendations would have been materially different if the new evidence had been available at the original FAI (rather than the determination as a whole being materially different), and the Lord Advocate decides that it is in the public interest for further proceedings to be held.

88. The definition of “new evidence” in subsection (3) is based on section 4(7)(b) of the Double Jeopardy (Scotland) Act 2011. It means evidence which was not available, and could not reasonably have been made available, at the original inquiry into the death.

89. Further inquiry proceedings can take one of two forms, either the re-opening and continuation of the original inquiry, or a completely new (fresh) inquiry being held into a death which was the subject of the original inquiry. The making of a determination by the sheriff is treated as the end of the original FAI in subsection (4). The sheriff will decide if further proceedings should be in the form of re-opening the original FAI or in the form of holding a fresh FAI (see section 30).

*Section 29 – Precognition of witnesses*

90. Section 29 allows the procurator fiscal to cite witnesses for precognition prior to any further proceedings. It is based on section 9 of the Bill and, if a person fails to comply when cited, the person is subject to the same level of sanction.

*Section 30 – Initiating further proceedings*

91. Section 30(1) requires the procurator fiscal to notify the sheriff that there are to be further proceedings in relation to the death and to provide a copy of the original determination as well as a brief account of the new evidence which has come to light. The sheriff to be notified is a sheriff of the sheriffdom within which the original proceedings were held (section 29(8)). Under subsection (2), the sheriff must set aside the determination made at the original inquiry and decide whether there is to be a fresh FAI or whether the original FAI is to be re-opened, and then make an appropriate order. This is not a matter for the Lord Advocate, nor is the location of the fresh or re-opened FAI.

92. Irrespective of whether the sheriff decides to re-open or hold a fresh FAI, the whole determination in the original proceedings must be set aside under subsection (2)(a). This is because, even if the only change to a determination is to record the new evidence led at a re-opened FAI, there will be another determination at the end of the further proceedings.

*Section 31 – Re-opened inquiries*

93. Subsection (1) applies sections 14 to 17 of the Bill (which provide for pre-inquiry procedure) to a re-opened inquiry in the same way as to the original inquiry. Subsections (2) to (4) modify the application of those sections to take into account that this is a re-opening of the original inquiry. Accordingly, as the procurator fiscal has already notified the sheriff that there are to be further proceedings, the notification procedure on the procurator fiscal in section 14(1) is disapplied by subsection (2). This subsection also provides that the sheriff is to make an order under section 14(2) at the same time as he or she makes the order under section 30(2). An order under section 14(2) is one fixing a date and place for the holding of a preliminary hearing and the inquiry.

94. Subsection (3) requires notice of the re-opened inquiry under section 16 to be given to the participants at the original FAI and persons to whom recommendations were originally addressed.

95. Subsection (4)(b) requires notice to include the nature of the new evidence which was provided to the sheriff by the procurator fiscal. The purpose of this is to focus the minds of participants as to why the FAI has been re-opened and help them to prepare the relevant submissions and evidence they may wish to lead and any relevant background evidence which was led at the original FAI and which is required in order to set the context of the new evidence.

96. Subsection (5) restricts the evidence that is to be led to evidence about the matters to which the new evidence relates. However subsection (6) permits any evidence to be led if the sheriff either requires or allows it to be led. Taken together, the intention is that there is to be strong presumption that the re-opened inquiry will consider only those matters related to the new evidence. However, there is a recognition that it may not be foreseeable where that new evidence will lead, permitting the sheriff to widen the scope of the inquiry as required.

97. As a continuation of the original proceedings, the re-opened inquiry is to be held in the same sheriffdom as the original proceedings (but may be transferred by the sheriff to a different sheriffdom under section 12(3)).

#### *Section 32 – Fresh inquiries*

98. Section 32 makes provision about fresh inquiries.

99. Subsection (2) requires the sheriff to make an order under section 14(2) (fixing the date and place for the holding of a preliminary hearing and the inquiry) at the same time as making the order requiring it to be held.

100. Subsection (3) requires the procurator fiscal to notify all participants in the original FAI about the fresh FAI.

101. Subsections (4) and (5) provide that the fresh inquiry is to be held in the same sheriffdom as the original inquiry, unless transferred by the sheriff to a different sheriffdom under section 12(3).

#### *Section 33– Further proceedings: compliance with recommendations*

102. Under section 30(2)(a), a sheriff will set aside the original determination made after the original proceedings. The sheriff will therefore issue a new determination at the conclusion of a re-opened or fresh FAI even if the only change to the original determination is to record the new evidence led at that FAI. Section 33(2) makes provision about the application of section 27 (compliance with the sheriff's recommendations) where there is a new determination.

103. Under subsection (2), the requirement on a participant to respond to a sheriff's recommendation under section 27 will not apply anew if the recommendation is the same as that already made in the original determination from the original FAI. This removal of a requirement to respond again to the same point does not affect any published response or published note of a lack of response made by SCTS in relation to the original FAI.

104. Under subsections (3) and (4), if a recommendation was addressed to a person in the original determination, but that recommendation is not made again in the new determination, the SCTS will be obliged to withdraw from publication any response made to the recommendation or any notice that no response has been given.

## **Inquiry procedure rules**

### *Section 34 – Power to regulate procedure etc.*

105. Section 34 gives the Court of Session a broad power to make acts of sederunt concerning the procedure and practice to be followed in FAI proceedings.

106. Subsection (1) contains a broad general power to make provision regarding practice and procedure. Subsection (2) contains some specific illustrative examples of the sort of matters about which provision may be made. For example, rules can be made in relation to witnesses and evidence (which may be used to further empower the sheriff to focus the evidence led on matters of concern to the inquiry having regard to its purpose), the conduct and management of FAI proceedings, the forms of documents used, and action to be taken before the FAI commences. However, this does not limit the broad power in subsection (1), which is a substantial widening of the power to regulate practice and procedure in FAIs.

107. Subsections (4) and (5) require the Court of Session to consult with the Scottish Civil Justice Council when making acts of sederunt which were not prepared in draft by the Council. The power to make rules under this section will be subject to transitional provisions set out in schedule 1 to the Bill as explained below.

## **Specialist sheriffs and summary sheriffs**

### *Section 35 – Judicial specialisation in inquiries*

108. Section 35 makes provision for sheriffs, part-time sheriffs, summary sheriffs and part-time summary sheriffs to be designated as specialist sheriffs in FAIs. Subsection (1) allows the sheriff principal to designate sheriffs and summary sheriffs within the sheriffdom, with section (3) allowing the Lord President of the Court of Session to designate part-time sheriffs and part-time summary sheriffs, who are not assigned to any particular sheriffdom, as specialists.

109. Subsection (5) makes it clear that it is still competent for a sheriff, part-time sheriff, summary sheriff, or part-time summary sheriff who is not designated as a specialist in FAIs to conduct an FAI. This may be inevitable owing to pressure of other casework. Under subsection (7), however, the sheriff principal must have to have regard to the desirability of allocating an FAI to a specialist.

### *Section 36 – Summary sheriff: competence to conduct inquiries*

110. Section 36 gives summary sheriffs the same competence as sheriffs to conduct FAIs.

### *Section 37 – Repeal and modification of enactments*

111. Section 37(1) repeals the 1976 Act in consequence of its re-enactment in the form of the Bill. For the most part the 1976 Act only extends to Scots law, however section 4(4) and (5) which are the precursor provisions for section 21 (publishing restrictions) extend to the law of England and Wales and Northern Ireland. The Scottish Government proposes that the full repeal of these provisions be progressed via the Order under section 104 of the Scotland Act 1998, as a natural consequence of extending the effect of section 21 to those jurisdictions. Section 37(2) introduces schedule 2 which is more fully described below. Insofar as any of the repeal modifies

the law on reserved matters this in the context of repealing provisions which are spent as a consequence of restatement in the Bill

## **General**

### *Section 38 – Interpretation*

112. Section 38 sets out the definitions that apply throughout the Bill unless the context requires otherwise.

## **Schedule 1 – Procedure rules**

### *Role of the Scottish Civil Justice Council*

113. Paragraph 1 of schedule 1 amends the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013, bringing the practice and procedure of FAIs and the making of FAI rules under the ambit of the Scottish Civil Justice Council.

### *Transitional arrangements*

114. Paragraph 2 of schedule 1 sets out the transitional arrangement affecting section 34. It will initially be the role of the Scottish Ministers, by regulations, to make FAI rules until such time as the provisions conferring responsibility on the Scottish Civil Justice Council and the Court of Session for the making of FAI rules are commenced. It is made clear that section 34(4), which requires consultation with the Scottish Civil Justice Council prior to the making of rules, will not apply during this transitional period. However, the Scottish Ministers must instead consult the Lord President and such other persons as are considered appropriate before making any such regulations.

## **Schedule 2 – Modification of enactments**

115. Schedule 2 repeals certain provisions in the Acts of Parliament referred to in section 3(2)(b), (c) and (e). The provisions being repealed have the same effect as section 3.

116. As mentioned, this also effects a restatement of reserved law. The provisions repealed in Scots law extend to the law of England and Wales and, except in the case of the Gas Act 1965, extend to Northern Ireland. The Scottish Government proposes that the full repeal of the provisions be progressed via the Order under section 104 of the Scotland Act 1998.

## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 19 March 2015. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.
2. The Policy Memorandum, which is published separately, explains in detail the background to the Bill and the policy intention behind the Bill. The purpose of this Financial Memorandum is to set out the costs associated with the measures introduced by the Bill, and as such it should be read in conjunction with the Bill and the other accompanying documents.
3. The Bill takes forward many of the recommendations made by Lord Cullen in his 2009 Review of the Fatal Accident Inquiry (FAI) Legislation that require primary legislation. Some of Lord Cullen’s recommendations were addressed to the Crown Office and Procurator Fiscal Service (COPFS) and have already been implemented, principally by the establishment of the Scottish Fatalities Investigation Unit. That Unit now oversees death investigations across Scotland and provides advice, support and expertise to procurators fiscal in order to ensure that policy and practice in the investigation of deaths is applied consistently.
4. The Bill provides an enabling framework and many of the detailed changes will be delivered through secondary legislation as FAI Rules. The Bill will repeal and re-enact the current legislation on FAIs to bring this area of law up-to-date.
5. The Scottish Government carried out a public consultation<sup>1</sup> in the summer of 2014 on the proposals to implement Lord Cullen’s recommendations and other measures to modernise the FAI system. The consultation provided organisations and individuals the opportunity to comment on the potential impacts of the proposals<sup>2</sup>. Further details of the consultation can be found in the Policy Memorandum.
6. The Financial Memorandum gives an overview of the impact on the Scottish Government, COPFS, Scottish Court and Tribunal Service (SCTS), and the other affected bodies as a result of the provisions in the Bill. However, many of the provisions will have no impact or financial element as they are a restatement (in modern drafting style) of the current provisions.
7. The estimates of costs and impacts contained in this Memorandum are compiled from information provided by those bodies affected by the Bill. It is estimated that there will be some impacts as a result of the Bill, however at this stage they are expected to be limited. The figures provided are the best estimates available.

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<sup>1</sup> Consultation paper: <http://www.scotland.gov.uk/Publications/2014/07/6772>

<sup>2</sup> Consultation responses and analysis: <http://www.scotland.gov.uk/Publications/2014/10/8764>  
<http://www.scotland.gov.uk/Publications/2014/11/2861>

## OVERVIEW

8. Currently the number of FAIs held each year are relatively small. The table below outlines the total number of FAIs commenced each year over the last four years. By way of comparison, there were 77,453 civil litigation cases in Scotland in 2012-13. The table also shows the volatility of FAI numbers due to the unpredictable nature of deaths requiring investigation and inquiry.

**Table 1: Number of FAIs commenced each financial year**

Financial year	Number of mandatory FAIs commenced	Number of discretionary FAIs commenced	Total number of FAIs commenced that year
2011/12	46	17	63
2012/13	35	11	46
2013/14	30	3	33
2014/15 <sup>3</sup>	54	5	59
<b>Total</b>	<b>165</b>	<b>36</b>	<b>201</b>

9. The existing costs of an FAI will not change as a result of the Bill. The Bill will not affect or change the long-standing common law duty of procurators fiscal to investigate sudden, suspicious or unexplained deaths in Scotland. Table 2 gives an overview of the average costs of three different lengths of FAIs. Obviously it is impossible to predict the number and length of FAIs in any given year and any additional FAIs provided for by this Bill will fall into one of these categories depending on the case itself.

**Table 2: Estimated cost to COPFS and SCTS of preparing and conducting an FAI**

	1 day FAI	1 week FAI	Lengthy FAI
COPFS <sup>4</sup>	£9,494	£13,122	£94,701
SCTS <sup>5</sup>	£2,000	£10,000	£90,000
Total	£11,494	£23,122	£184,701

10. The one-day FAI is based on a straightforward mandatory FAI into a death in custody heard over one day or less. The one week FAI is based on a week-long mandatory FAI into a death as a result of a work-place accident. The lengthy FAI is based on a discretionary FAI involving complex medical evidence (the length of 45 days has been used for the SCTS cost as an example). The impact on SCTS relates to the accommodation, services, staff and judiciary it provides for the purposes of FAIs.

11. The following assumptions were made in estimating the existing costs in table 2. The costs for SCTS are based on the actual court sitting days for the hearing and, as such, do not include preparation work, including preliminary hearings. They also exclude any additional costs if the FAI is held outwith a sheriff court room. Details of the costs of using alternative accommodation are available at paragraph 58. The estimates for COPFS for the one-day FAI

<sup>3</sup> Figures as at 31/1/15

<sup>4</sup> Includes administrative, precognition, Victim Information & Advice (VIA), legal, pathology and witness costs.

<sup>5</sup> Based on the basic approximate cost of an FAI sitting in a sheriff court, which includes judicial and staff costs as well as running costs.

and the one-week FAI assume that administrative and legal staff costs were mid-range; the legal costs for COPFS for the lengthy FAI were, however, calculated at the equivalent of the Civil Service Grade 6 level (£53,060 - £64,733).

12. The figures in tables 1 and 2 show that the numbers and costs of FAIs vary each year and depend on the nature and circumstances of the death. There were markedly fewer FAIs held in 2013/14 compared to other years. Furthermore, no practical change is being made in the Bill to the law in relation to the categories that currently result in the most FAIs (work place accidents and deaths in prison). Therefore, it is not expected that any changes provided for by this Bill will have a substantial effect on the numbers of FAIs held each year. As noted later in this document, there may be an additional one or two FAIs per year due to the change in definition for mandatory categories of FAIs and also the addition of discretionary FAIs into deaths abroad.

13. Table 3 below, outlines the costs for COPFS' role in investigating deaths, which put the amount of business and resource for death investigations (of which FAIs are only a part) into context.

**Table 3: COPFS expenditure and staff<sup>6</sup>**

	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>
Total expenditure in £000s	£105,604	£104,456	£106,095
Death investigation expenditure in £000s	£4,153	£4,107	£4,172
Total permanently employed staff	1,526	1,436	1,379
Staff employed on death investigations <sup>7</sup>	43	40	45

## **BILL PROVISIONS**

14. There are very few provisions within the Bill which are expected to commit the Scottish Administration to additional spending.

15. The Bill will:

- amend the categories of death in which it is mandatory to hold a fatal accident inquiry to ensure that all deaths in police custody and deaths of children in secure accommodation are covered;
- permit FAIs at the discretion of the Lord Advocate into deaths of Scots abroad where the body is repatriated and where there is a realistic prospect that the inquiry will yield significant findings;
- build on recommendations implemented by the Crown Office to make the system more efficient;
- provide flexibility for the location and accommodation for FAIs; and
- place a requirement on those to whom sheriffs direct recommendations at the conclusion of the inquiry to respond to indicate what, if any, action they have taken.

<sup>6</sup> Figures taken from COPFS annual reports and accounts, available at:

<http://www.copfs.gov.uk/publications/finance>. This expenditure is for the net operating costs only

<sup>7</sup> The average number of whole-time equivalent persons employed permanently on death investigations.

## **COSTS ON THE SCOTTISH ADMINISTRATION**

16. The Bill's provisions are not expected to have cost implications for the Scottish Government. As part of the legislative provision to reform the FAI system, new FAI Rules will be required. The Rules will be made by the Scottish Ministers as a transitional arrangement before the rule-making power is conferred on the Court of Session, advised by the Scottish Civil Justice Council (SCJC).

17. There will be no new provisions for enforcement or sanction (e.g. sanction for not giving evidence) in the Bill or subsequent FAI Rules. This is an enabling Bill to provide the statutory framework to implement Lord Cullen's recommendations, and to enable COPFS, SCTS and Lord President to make the system more efficient and provide appropriate flexibility. The provisions to make the FAI system more efficient are expected to have a positive impact on the implementing bodies and the public, although the impact is not measurable in financial savings.

18. The parts of the Scottish Administration affected by the proposals will mainly be COPFS and SCTS, with the Scottish Prison Service and Police Scotland also having an interest. The impact on each body is set out below under the impact of each of the main provisions. The staff involved in the FAI process are salaried and there will be no additional cost for staff or administration within the current business profile.

19. Overall, looking at the provisions in the Bill there will be an additional cost to COPFS for investigating any deaths abroad each year. This is expected to be around 50 cases each year and COPFS estimate this will cost around £157,350.

20. As stated above there may also be up to an additional two FAIs each year due to the provisions in the Bill. It is impossible to predict the expected length of any additional FAI, however, based on a mid-length FAI then this would cost an estimated £26,000 to COPFS and £20,000 to SCTS (based on the averages set out in Table 2).

## **COSTS ON LOCAL AUTHORITIES**

21. Extending the mandatory categories of FAI to include deaths of children in secure accommodation will be of interest to local authorities as they provide secure accommodation approved in accordance with regulations made under section 78(2) of the Public Services Reform (Scotland) Act 2010. However, there are not expected to be additional costs to local authorities as a result of this measure because an increase in the number of FAIs as a result of this provision is unlikely, as set out in paragraphs 37-39.

22. The majority of local authorities which responded to the Government's consultation indicated support for the above provision and the proposal for a response to sheriffs' recommendations. Most local authorities stated that the proposal for sheriffs' recommendations would not impact on them negatively based on their existing practices.

## **COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

23. Responses to the consultation and meetings with stakeholders indicate that the proposals will have only a minimal financial impact on organisations. The proposal regarding responding to sheriffs' recommendations is supported by regulatory bodies such as the Health and Safety Executive and the Care Inspectorate which already react to recommendations they are aware of and note their decisions.

24. Business or consumer groups did not respond to the consultation despite being sent a notification. It is assumed that they consider that they will not be affected by the Bill. Some responses were received by insurance firms, but no concerns over financial impact were raised. A Business and Regulatory Impact Assessment (BRIA) is not necessary because changes in the Bill to the current system will not affect businesses except in the very exceptional circumstance that they may be obliged to respond to a sheriff's recommendation. Any additional costs for public sector organisations will also only relate to responding to sheriffs' recommendations.

### **Scottish Legal Aid Board**

25. The proposals do not intend to change the provision of legal aid for FAIs. There may be a very slight increase in the number of FAIs arising from the provisions for mandatory FAIs into deaths of children in secure accommodation and discretionary FAIs into deaths abroad, which may lead to a similarly slight increase in applications for legal aid. However, it is impossible to determine which FAIs could lead to a legal aid application and, as noted in table 1, the numbers of FAIs vary every year. As table 4 below shows, the average cost for funding an FAI varies significantly.

26. The current upper limit for disposable income for civil legal aid is £26,239 per annum. The disposable income limit is such that it is estimated that around 75% of the Scottish population qualify for civil legal aid (which includes FAIs) based on their disposable income. According to the SLAB, the cost of an FAI can vary considerably. For example, representation for the Rosepark Care Home FAI cost around £1.1 million in 2009/10. These are part of the natural variations in the total costs of FAIs and, as such, are not expected to be impacted by the proposals in this Bill.

27. There are two main types of legal aid help: advice and assistance (for all matters of Scots law) and legal aid (for legal representation in court). Together these are called legal assistance. The figures provided by SLAB at table 4 below for certificate payments are for legal aid only, which represent the most significant element of these costs to SLAB.

**Table 4: Legal assistance for FAIs**

	<b>2009/10</b>	<b>2010/11</b>	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>
Number of legal assistance applications for FAIs	33	38	16	10	18
Number of legal aid certificates paid for FAIs <sup>8</sup>	27	25	10	8	8
Average payment per certificate <sup>9</sup>	£88,950	£36,970	£18,124	£4,405	£16,966
Range of certificate payments	£1,470 to £389,581	£197 to £166,103	£161 to £110,891	£823 to £9,411	£1,764 to £82,894
Total paid from Fund for FAIs	£2,401,661	£924,261	£181,236	£35,239	£135,727

28. There are a number of caveats for the figures provided by SLAB and what can be estimated from them. There is a level of unpredictability of the cost per legal aid certificate for each individual and then that unpredictability is increased as FAIs can involve more than one legally-aided person per case. Given the length of these cases, and the fact that they can often span several years, it is likely that SLAB will make part payments on these cases, thereby spreading the costs of the cases across multiple years and limiting the assumptions that can be made regarding average costs.

29. Based on an additional two FAIs each year due to provisions in this Bill it is impossible to predict whether those involved will require or be eligible for legal aid. Therefore, there may be a slight increase to the charge on the Legal Aid Fund as a result of the Bill but this will have no substantial effect to the general variation of FAI costs across the years.

### **NHS Scotland**

30. NHS Scotland is involved in FAIs when inquiries are held at the discretion of the Lord Advocate into deaths in hospitals or some other form of health care setting. Doctors, nurses and other healthcare workers often give evidence and “medical” inquiries can be among the most complex and long-running FAIs. The provisions of the Bill will not affect the number or length of such medical inquiries. It is essential that, if the circumstances of a death have caused serious public concern, there should be a proper and thorough investigation. There should be no additional costs for NHS Scotland as a result of the Bill. There may be some administrative and legal costs incurred in responding to recommendations, however the numbers of these are expected to be minimal as sheriffs only make recommendations in fewer than 20 FAIs per annum and few of these will relate to medical inquiries. In such cases, remedial action is likely to have been taken by the time the sheriff makes recommendations and a response will simply explain what action has been taken. NHS bodies will normally be represented at FAIs by their

<sup>8</sup> Number of certificates paid out so far each year. Some cases that have been granted legal aid have yet to be concluded so this figure is subject to change

<sup>9</sup> This excludes any nil payments for legal aid certificates. This is not the average cost of an FAI case as there could be multiple certificates for one FAI. An example is the Rosepark FAI which resulted in a total of £2.1 million paid across 6 parties

own legal representatives and the response to a recommendation addressed to such a body will be dealt with by those legal representatives. Therefore, any additional cost as a result of this Bill relates only to the drafting and issuing of a written response, which will not be substantial.

## **BILL PROVISIONS: CATEGORIES OF INQUIRIES**

### **Existing mandatory categories**

31. FAIs are currently mandatory for deaths that occur as a result of an accident in the course of employment or which occur in legal custody. It is not proposed to change the existing mandatory categories.

#### *Costs on the Scottish Administration*

32. These categories will be re-enacted and, therefore, there will be no financial impact on the Scottish Administration or those involved in FAIs.

### **Deaths when under police arrest or detention**

33. The Bill implements Lord Cullen's recommendation to make FAIs mandatory for deaths in all types of legal custody irrespective of the place of death. It offers the same level of protection for everyone under police care and legal custody. In requiring a mandatory FAI for deaths of people under police arrest irrespective of the location, the Bill provisions clarify the circumstances in which a mandatory FAI should be held for a death in police custody.

#### *Costs on the Scottish Administration*

34. COPFS interprets the term "detention" in section 1(4) of the Fatal Accidents and Sudden Deaths (Scotland) Act 1976 in the plain English usage and does not differentiate between a person "detained" in terms of a statutory provision or under "arrest". The key question is whether the person's liberty is deprived at the point of "detention" — all such inquiries are held in terms of section 1(1)(a)(ii) of the 1976 Act. As a mandatory FAI would be held for any death during police arrest under the existing legislation, it is not expected that this provision will increase the number of FAIs, and is not, therefore, expected to give rise to extra costs to Police Scotland, COPFS, or SCTS.

#### *Costs on other bodies, individuals and businesses*

35. An increase in the number of FAIs due to this provision is not expected, therefore there should not be an increase in the number of legal aid claims as a result.

36. SLAB's existing guidance in relation to applications for representation at an FAI indicates that it is considered that the reasonableness test for civil legal aid is met where a death arises while an individual is in custody. In practical terms SLAB treats "in custody" as covering deaths in prison, at police stations, or in other care institutions and it provides funding to otherwise eligible individuals if the death occurred while the deceased was arrested or detained by the police. This, along with COPFS' interpretation of police custody, means that there will be no change to the costs for SLAB as a result of this provision.

## **Deaths of children in secure accommodation**

37. The Bill will extend the mandatory categories of FAIs to cover all deaths of children in secure accommodation as per Lord Cullen's recommendation.

### *Costs on the Scottish Administration*

38. There has been no death of a child in secure accommodation in the last five years. An FAI would usually be held on a discretionary basis for any deaths of children in secure accommodation under the current legislation unless the bereaved relatives were strongly opposed. It is, therefore, thought that having this as a mandatory category could result in no more than an additional one or two FAIs every few years. Given the minimal numbers, these additional FAIs are expected to be managed as part of the natural flux of death investigations and FAIs.

### *Costs on local authorities*

39. Given the small numbers, it is not anticipated that this proposal will have a significant impact on local authorities. Even if it results in one additional FAI per year, which would be unlikely given the figure above, this could be managed from existing resources as part of duties regarding looked-after children. The local authorities that responded to the consultation agreed with this proposal and did not raise any resource concerns.

## **Discretionary FAIs**

40. The provision in the 1976 Act for the Lord Advocate to hold a discretionary FAI will be re-enacted in the Bill so that a discretionary FAI can be held when:

- the death was sudden, suspicious or unexplained, or it occurred in circumstances which would give rise to serious public concern; and
- it appears to the Lord Advocate to be in the public interest that a FAI be held.

41. If the Lord Advocate decides against holding a discretionary inquiry, the Lord Advocate will have to provide reasons in writing to the bereaved family if requested so to do. This simply reflects existing COPFS practice. COPFS also writes to bereaved families, if requested to do so, in order to explain why an FAI is not to be held if a death falls within one of the mandatory categories, but the Lord Advocate takes the view that the circumstances of the death have been sufficiently established in other proceedings such as a criminal trial.

## **Investigations and inquiries into deaths abroad**

42. Lord Cullen recommended that the Lord Advocate should have discretion to hold an FAI into the death abroad of a person ordinarily resident in Scotland whose body has been repatriated to Scotland. The provision will largely bring Scottish legislation in line with that in England and Wales where an inquest must be held into the death of everybody repatriated to a coroner's area where the cause of death is unnatural, violent, or unknown.

43. Lord Cullen indicated that he thought that this power would be used very rarely out of respect for the investigating authority in the country concerned. There is, moreover, no intention that COPFS or Police Scotland should travel to the country where the death took place to conduct investigations. Rather, investigations will be conducted in the same way as is done by coroners in England and Wales.

*System of Coroner's Inquests in England and Wales*

44. Since the decision of the Court of Appeal in 1983 in *R v West Yorkshire Coroner, ex parte Smith* [1983] QB 335 (the case of Helen Smith), coroners in England and Wales must hold an inquest into a death overseas if the body is returned to the coroner's district and the circumstances are such that an inquest would have been held if the death had occurred in England and Wales.

45. As the provision in Scotland will be discretionary rather than mandatory, it will be less costly to implement than in England and Wales. Unlike the provision in the Bill, coroners must investigate a death irrespective of whether the deceased was a British national and/or was ordinarily resident in England and Wales. For illustrative purposes, the cost of such an inquest is estimated to be less than £3,400, based on a post-mortem costing in the region of £300, translation costs of up to £3,000, and the cost of reports from foreign jurisdictions.

46. Around 6,000 Britons die abroad each year. However, the vast majority of these will be expatriates and not those ordinarily resident in the United Kingdom. There are no accurate statistics available on the number of bodies repatriated to the UK as they do not have to be registered. The Foreign and Commonwealth Office (FCO) is not informed of every death.

*Repatriations to Scotland*

47. There are currently no accurate statistics kept on deaths of domiciled Scots abroad as there is no requirement to report them to the procurator fiscal or to register the death with the National Records of Scotland (NRS). NRS has a record of only 25 deaths of domiciled Scots abroad in 2013 but the figure is likely to be higher. The number of bodies repatriated to Scotland each year to be cremated is approximately 100. Figures are not readily available for the numbers of bodies repatriated for burial as they do not have to be registered with the authorities. However, there are likely to be at least the same number per year as for cremations. There is no way of working out which of these people were domiciled Scots to estimate the number of potential investigations and FAIs as a result of this provision.

*Costs on the Scottish Administration*

48. Of the cases of domiciled Scots deaths abroad where the body is repatriated to Scotland, the overwhelming majority will be natural cause or expected deaths with no unexplained circumstances and very few may require further investigation. For those that do, the investigation will be akin to a liaison exercise rather than a full detailed investigation due to the lack of powers to cite witnesses or obtain documents from abroad. Put into context, of approximately 11,000 deaths reported to COPFS, there are only around 50-60 FAIs held per annum. It is, therefore, reasonable to expect very limited additional inquiries as a result of this provision.

49. There will be no power for COPFS to cite witnesses from abroad, therefore any inquiry will be based on documentary evidence provided, as is the case for coroners' inquests. Correspondence (the cost of which is in table 5 below) is expected even when no investigation or FAI will take place as the families will have questions and expectations as a result of the provision being available. Therefore, it will be important to manage the expectations of bereaved families to mitigate the impact of unnecessary correspondence.

50. In Scotland, there are not expected to be additional post-mortem costs as: (a) pathologists' costs are provided in terms of contractual arrangements rather than being fee-paid for each post mortem in Scotland, and (b) they cannot be carried out if the body has been embalmed as is usually the case when a body is prepared for repatriation. Post mortem reports from the foreign authorities can be used instead.

**Table 5: estimated potential costs for investigating deaths abroad**

Translation costs	£1,207
Staff costs - Liaison with nearest relatives and general correspondence	£440
Staff costs – Liaison with authorities in foreign jurisdiction	£1,500
<b>Total cost</b>	<b>£3,147</b>

51. In arriving at this figure, COPFS made the following assumptions:

- The documentation that will require to be translated will include any police report, post mortem and/or toxicology report and witness statements;
- The number of witness statements will be the same as a current case involving an FAI of one week's duration, namely 21 witness statements; and
- The level of liaison and correspondence will equate to a current case involving an FAI of one week's duration.

52. For coroners' inquests in England and Wales, the FCO seeks documentation from the local competent legal authorities and then provides this to the coroner's office for investigation. If the same arrangement can be made, which is a reasonable assumption given that FCO already supports Scottish residents abroad as British nationals and their relatives if there is an accident or death, then this will result in less costs for COPFS directly. As FCO already provides consular support for the deaths of Scots abroad that it is aware of, this should not result in a significant increase in its costs. Furthermore, documents, such as a death certificate and any post-mortem and toxicology report, should be provided with the body as part of repatriation. Therefore, it is likely to be police reports and witness statements that will be sought for investigation and any potential FAI.

53. It is difficult to predict how many deaths abroad will be reported to COPFS and could require investigation each year. If a burial or cremation has taken place abroad, or a body is not found, then this would not require investigation for an FAI. Based on estimates of bodies repatriated to Scotland being around 200 per year, the number requiring investigation will be much less as not all of the deceased will be ordinarily resident in Scotland. COPFS has estimated that there are likely to be no more than 50 investigations of deaths abroad each year at a total cost of approximately £157,350, which takes account of the fact that some of the liaison

should be done by FCO. Based on this level of investigations, COPFS estimates that there will be no more than one FAI per year into a death abroad, which would only be held if it is in the public interest to do so according to specific criteria set out by the Bill. This is broadly in line with the number of FAIs held as a proportion of death investigations carried out by COPFS. The cost of an FAI into a death abroad should not cost any more than an FAI into a death that occurred in Scotland as the additional costs resulting from liaison and translation will be part of the investigation costs in table 5. Therefore, depending on the complexity and therefore the length of any inquiry, the expected average cost would be as set out in Table 2 (e.g. £13,000 cost to COPFS and £10,000 cost to SCTS for a mid-length inquiry).

#### *Costs on other bodies, individuals and businesses*

54. As noted above, there is not expected to be any more than one FAI of this type each year. In some of these cases there may be an additional claim on the Legal Aid Fund. Table 4 sets out the average and range of costs for Legal Aid and it would be assumed this would be the same for any FAIs of this type.

## **INCREASING EFFICIENCY AND FLEXIBILITY FOR FAIS**

### **Location of FAIs**

55. An inquiry will be capable of being held in any place where there is a sheriff court and can be transferred from one court or sheriffdom to another. Other venues can also be used as currently happens for some longer running FAIs. This will allow greater flexible use of the existing court and tribunals estate as well as greater opportunity to use ad hoc non-court accommodation, which will support the efficient disposal of business and Lord Cullen's recommendation that FAI should be held outwith a courtroom accommodation wherever possible. The provisions for jurisdiction and accommodation in the Bill do not require SCTS to hold FAIs outwith courts, but merely enables that option.

#### *Costs on the Scottish Administration*

56. It is anticipated that these enabling provisions will have a positive impact on SCTS as it will permit it to use any sheriff court or extend its practice of allocating an FAI to ad hoc premises. The main advantage will be to allow flexibility in programming and to reduce any delays in the allocation of dates for hearings. Arrangements for accommodation for FAIs is an operational matter for SCTS which is an independent, judicially led body. If it decides to extend the use of ad hoc non-court accommodation, the costs are set out below.

57. The SCTS has to date made use of ad hoc non-court premises in Glasgow, Motherwell and Aberdeen, which have already been configured to provide appropriate IT and accommodation for court use, allowing them to be used at relatively short notice (within six-eight weeks). The ongoing cost of setting up these premises is approximately £4000 per FAI depending on provision of services required. This does not include the cost of renting the premises. The cost of running an FAI in total, including rent and other costs in such ad hoc premises, can be significant, ranging between £100,000-150,000 (with a recent six-week inquiry costing over £112,000). The SCTS considers there are operational advantages to using such premises earmarked for the hearing of FAIs to support the overall management of the FAI and court programme but the cost of using these premises requires appropriate budget support.

58. The SCTS has a long-term vision for justice centres, dependent on the appropriate budget provision, and is looking initially at Fife, Lanarkshire and Inverness. Such centres will provide a full range of specialist support services which will complement the high quality courts which exist in many of Scotland's cities and could include FAIs. The SCTS will work up feasibility studies into the three areas identified for justice centres. The SCTS believes that, with the relevant funding in place, justice centres can be progressed in the next three to five years. It is possible that bespoke accommodation for FAIs might be made available with such centres if they are set up.

#### *Costs on other bodies, individuals and businesses*

59. It is anticipated that the benefit of having the flexibility for FAIs to be held in any court or other appropriate accommodation will balance the potential inconvenience and cost of participants to an inquiry having to attend further away than expected or to change location if the inquiry is transferred. The choice of sheriffdom will be made by the Lord Advocate in consultation with SCTS, and the choice of court or non-court premises will be a decision for the sheriff principal. These choices will take into account the needs and location of the participants. The sheriff will determine if a case is to be transferred in consultation with the sheriff principal of the other sheriffdom. This will allow the efficient disposal of business with the needs of the bereaved families also being considered.

#### **Preliminary hearings**

60. The Bill provides for preliminary hearings to be held for every FAI, unless the sheriff decides to dispense with such a hearing, which follows the successful practice in Glasgow and Edinburgh. FAI Rules will govern that decision as well as the purpose of a preliminary hearing. The purpose of the preliminary hearing is to try to establish how much evidence needs to be heard at the FAI hearing itself and is thus intended to facilitate an estimate of how much court time will be required.

61. It is proposed that preliminary hearings may be held by conference call, video-link or in chambers, rather than having to convene a full court and the FAI Rules will allow for this.

#### *Costs on the Scottish Administration*

62. This provision will simply provide a statutory basis for what largely happens in practice in many areas allowing greater judicial case management at the discretion of the sheriff. Therefore, this provision will have no additional costs and will be met within existing resources of COPFS and SCTS.

#### **Agreement of facts**

63. The Bill makes it clear that agreed statements on matters which are uncontroversial can be submitted before the FAI hearing.

*Costs on the Scottish Administration*

64. Joint statements of agreed facts are currently used in some FAIs and this provision merely clarifies and encourages their use.

65. Providing for agreement of facts may have a beneficial impact on the duration and, therefore, the costs of the FAI, though this is impossible to quantify. The Act will encourage the fiscal and each of the participants at the inquiry to take reasonable steps to reach agreement about any facts in relation to which the fiscal or participant intends to bring forward evidence and which the fiscal or as the case may be participant considers unlikely to be disputed by the other participants.

*Benefits*

66. The benefit of front-loading the process using the above provisions will free up time for the actual inquiry and give it focus with increased judicial case management. This is expected to benefit all involved in an FAI. An example of some of these provisions working can be found at Glasgow Sheriff Court where a pilot has been operating with regular preliminary hearings, increased judicial case management, front-loading of resources and agreement of uncontroversial facts. This has helped clear the backlog of FAIs waiting to be heard at Glasgow Sheriff Court.

**SHERIFFS' DETERMINATIONS**

67. The proposal that parties to whom sheriffs make recommendations in their determinations should respond will encourage compliance and accountability and bring the system in relation to sheriffs' recommendations more into line with what happens in relation to coroners' reports in England and Wales. The greater dissemination of recommendations and public record of responses will hopefully lead to lessons being learned and deaths in similar circumstances being avoided in the future. A model for a similar scheme can be found in section 29 of the Coroners (Investigations) Regulations 2013.<sup>10</sup>

68. All sheriffs' determinations at the conclusion of FAIs will be published on the SCTS website. At present some determinations which are thought to be of legal or other interest have been posted on the SCS website at the decision of the sheriff, so this proposal is merely an extension of existing practice. The most recent 50 determinations online are listed and all published determinations since 1999 are searchable. This provision will mean that all sheriffs' recommendations will be available for the public and organisations to see and search online, providing a useful resource.

69. Sheriffs will have a power to disseminate determinations not only to participants of an FAI, but also to bodies which did not participate, such as regulatory bodies that can apply recommendations that are agreed. Sheriffs already send copies of their determinations to participants in an FAI. The proposal will hopefully lead to more transparency and lessons being learned from the circumstances of a death. This is a non-mandatory power for sheriffs to use at their own discretion.

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<sup>10</sup> The Coroners (Investigation) Regulations 2013:  
[http://www.legislation.gov.uk/uksi/2013/1629/pdfs/uksi\\_20131629\\_en.pdf](http://www.legislation.gov.uk/uksi/2013/1629/pdfs/uksi_20131629_en.pdf)

70. It is proposed that parties to whom sheriffs' recommendations are addressed will be obliged to respond to the SCTS indicating:

- what steps the person has taken or proposes to take to comply with recommendations addressed to it; and
- if there are any aspects of the recommendations which the person does not intend to comply with, their reasons for not complying with them.

71. Although those participants would not be obliged to comply with the sheriff's recommendations, they would be obliged to explain the reasons why they have not complied if they do not intend to comply. Representations can also be made by the respondent to indicate why the response, or part of it, should not be published. A copy of the response will be published on the SCTS website with the original determination, or a note if no response has been received within eight weeks. There is to be no penalty should a person fail to respond. This provision will ensure there is a public record of any follow up action in response to sheriffs' recommendations, which will increase transparency, compliance and accountability. This would be a proportionate and practical way of ensuring that sheriffs' recommendations are considered by those to whom they are addressed.

### **Costs on the Scottish Administration**

72. There are 50-60 FAIs per annum on average (with only 33 commenced in 2013) and sheriffs make recommendations in only around a third of these. In the year to 31 January 2015, 36 determinations were published by SCTS on the instruction of the presiding sheriff<sup>11</sup>. This means that almost all FAI determinations are currently published. Any minor administrative costs in the duty to publish all FAI determinations can be managed by SCTS using existing resources as it is an extension of current practice. The cost of disseminating recommendations to other bodies is part of the overall cost of SCTS supporting the sheriff at an FAI, and is also an extension of existing practice, so can be managed. This is a power rather than a duty for the presiding sheriff and so no costs are being imposed as a result of this provision.

73. Receiving, checking and publishing responses is not expected to be too onerous given the low volume of determinations in which recommendations are made (fewer than 20 per year). More than one participant may have to respond. However, not all responses will require full legal examination to ensure they comply with data protection and defamation laws. The role will be similar to checking responses to consultations before publication. In England and Wales, the Chief Coroner's Office simply removes names when redacting. That Office also informs that no responses received have contained defamatory material, so the likelihood in Scotland is very low, particularly given that many responses will come from public bodies. Allowing representations to be made will mean that participants can have a say in what should be published.

74. The Scottish Government and SCTS are developing the costs for this work. However, it is expected that these costs will not be significant. The cost of actual publication will be

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<sup>11</sup> This is based on FAI determinations visible on the SCTS website at <https://www.scotcourts.gov.uk/search-judgments/fatal-accident-inquiries>

minimal as the IT provisions are already in place. The result of lessons being learned from sheriffs' recommendations is a long-term benefit and purpose of the FAI system.

### **Costs on local authorities**

75. Most local authorities and public bodies already have a review process in place to deal with recommendations. There may be some administrative and legal costs incurred in responding to recommendations but these were not specified in consultation responses. Regulatory bodies and local authorities that responded to the consultation supported this proposal and did not raise any concerns. Only one local authority indicated that there could be financial and policy considerations and no standard costs can be provided as they will depend on the nature and extent of the recommendations.

76. As there will be no penalty for non-compliance, the provision will not have a direct financial impact on bodies. Furthermore, only bodies that participated in the FAI will be obliged to respond, so responding to recommendations will become part of the overall costs of being involved in an FAI.

### **FURTHER INQUIRY PROCEEDINGS**

77. Lord Cullen suggested that there could be a basis for re-opening an FAI if new evidence becomes available which could affect the FAI findings and any recommendations in the determination. In these cases, the Lord Advocate will decide if further proceedings are appropriate (i.e. if it is in the public interest and it is likely that the new evidence will materially affect the original determination). The sheriff is to have the discretion to determine whether the original FAI is to be re-opened, or whether a fresh FAI into the same death or deaths is appropriate. The sheriff's decision is likely to be based on how much of his or her original determination would be affected by the new evidence which has come to light.

78. This power will only be used in the public interest with a high test for the definition of new evidence, therefore it is expected to be used rarely. The costs of any additional proceedings will be managed as part of the flux of FAIs. Those affected by this provision are likely to be those involved in the original inquiry.

### **Costs on the Scottish Administration**

79. COPFS will be responsible for preparing the evidence for any further inquiry proceedings; therefore, this provision will impact on them the most. The power will be at the Lord Advocate's discretion and it will be a matter for COPFS to resource it appropriately.

80. The reopened inquiry will cover matters affected by the new evidence and it should, therefore, not be as long or cost as much as the original inquiry. As noted above, this power will be used very rarely due to the stringent tests and the low likelihood of new evidence coming to light.

81. SCTS will incur costs for any additional proceedings but, as these are expected to only occur rarely, these will be managed within the current fluctuations in numbers of FAIs.

## **JUDICIARY**

### **Judicial specialisation**

82. The Bill will allow for sheriffs principal to designate sheriffs as specialists in relation to FAIs and decide if an FAI should be allocated to a specialist sheriff.

#### *Costs on the Scottish Administration*

83. If the power to designate specialist FAI sheriffs is used, the Lord President may decide to require such sheriffs to undertake judicial training for FAIs. Training in FAIs is already provided by the Judicial Institute for Scotland (JIS), which is part of the Judicial Office for Scotland<sup>12</sup>, and the content will need to be revised to cover changes to legislation. Training costs will be handled as per current budgets, as the training will be based on what is currently used for sheriffs and is part of the Lord President's function.

84. The JIS entirely endorses Lord Cullen's recommendation 3 in respect of judicial training, namely that JIS should include the law and practice of FAIs in its seminars, and sheriffs should be encouraged to take advantage of attending them. JIS has confirmed that there has been a clear focus for such training in its programmes over the years. Furthermore, the JIS will continue to train in this important area and monitor developments with new legislation which will present more need and focus for this kind of specialist training.

### **Summary sheriffs**

85. It is proposed that the new summary sheriffs introduced by the Courts Reform (Scotland) Act 2014<sup>13</sup> will have competence to preside over FAIs. Under the 2014 Act, summary sheriffs will have jurisdiction to deal with summary criminal business and civil business not exceeding £5000 in value as well as some family cases and any other specialisations required, with the aim of having the right cases heard by the right level of judiciary. The establishment of a third tier of judiciary, summary sheriffs, to deal with such business means that sheriffs will be freed up to devote more time to more complex casework. This principle applies equally to FAIs as it does to civil and criminal business in the sheriff court.

#### *Costs on the Scottish Administration*

86. The use of summary sheriffs will have no cost implications for SCTS as it will be a redeployment of resources across sheriff court business.

## **FAI RULES**

87. The Bill amends the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 to provide the Scottish Civil Justice Council (SCJC) with the power to propose rules of

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<sup>12</sup> The Judicial Office is a separate part of the SCTS established to provide support to the Lord President in his role as head of the Scottish judiciary with responsibility for the training, welfare, deployment, guidance and conduct of judges and the efficient disposal of business in the courts.

<sup>13</sup> Courts Reform (Scotland) Act 2014 [http://www.legislation.gov.uk/asp/2014/18/pdfs/asp\\_20140018\\_en.pdf](http://www.legislation.gov.uk/asp/2014/18/pdfs/asp_20140018_en.pdf)

procedure for public inquiries into certain deaths (referred to as Fatal Accident Inquiries or FAIs).

88. FAI Rules are currently made by the Scottish Ministers under rule-making powers in the 1976 Act as amended by subsequent secondary legislation. The SCJC will be unable to assume responsibility for FAI rule-making for some time as it will be concentrating on court reform following the enactment of the Courts Reform (Scotland) Act 2014.

### **Costs on the Scottish Administration**

89. It is proposed that the SCJC will take on work on FAI Rules when it is ready so to do. Until that time, the Scottish Ministers would continue to make rules for FAIs, as is currently the practice. The new FAI Rules will be drafted in consultation with the Lord President, SCTS, COPFS and other appropriate persons. As FAI Rules will be written by the Scottish Ministers, it is not expected for there to be a substantial workload for the SCJC to undertake. Its role will mainly be to review the FAI Rules, which is estimated to commence in 2018.

90. The SCJC can accommodate this function under existing resources as the work on courts reform will have reduced by 2018 with staff working on other areas, including Tribunals and FAI Rules.

### **IMPLEMENTATION**

91. It is anticipated that COPFS will record FAI cases and maintain statistics so that there can be an assessment of the reforms.



*These documents relate to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (SP Bill 63) as introduced in the Scottish Parliament on 19 March 2015*

## **SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE**

On 19 March 2015, the Cabinet Secretary for Justice (Michael Matheson MSP) made the following statement:

“In my view, the provisions of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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## **PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

On 19 March 2015, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

*These documents relate to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland)  
Bill (SP Bill 63) as introduced in the Scottish Parliament on 19 March 2015*

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

## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

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

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## **DELEGATED POWERS MEMORANDUM**

### **INTRODUCTION**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by Parliament.

### **OUTLINE OF BILL PROVISIONS**

3. The policy objective of the Bill is to reform and modernise the law governing the holding of fatal accident inquiries (FAIs) in Scotland. It largely implements the recommendations made in the 2009 Review of the Fatal Accident Inquiry Legislation<sup>1</sup> led by the Rt Hon the Lord Cullen of Whitekirk KT, the former Lord President of the Court of Session, insofar as these have not already been implemented.

4. The Review made 36 recommendations for change. The Scottish Government published a response to the Review in March 2011<sup>2</sup> and has accepted the majority of these recommendations, but has diverged in a small number of areas which are explained in this Policy Memorandum. Many of the recommendations of the Review will be implemented by rules to be made under a power given in the Bill as they concern matters which either do not require primary legislation or are more appropriate for setting out in rules as they concern the routine organisation of FAIs.

### **RATIONALE FOR SUBORDINATE LEGISLATION**

5. The Bill contains a number of delegated powers provisions. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against:

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<sup>1</sup> <http://www.scotland.gov.uk/Publications/2009/11/02113726/0>

<sup>2</sup> <http://www.scotland.gov.uk/Publications/2011/03/18150120/1>

- the need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- the principle that FAI Rules should be drafted under judicial supervision (subject to the transitional arrangements described below);
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation;
- the need to ensure proper use of parliamentary time;
- the possible frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

6. The relevant provisions are described in detail below. For each provision, this memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

7. Subordinate legislation is required to implement the Scottish Government's policy and some form of parliamentary procedure is appropriate. For the decision on negative or affirmative procedure, the Scottish Government has considered carefully the degree of Parliamentary scrutiny that is thought to be required for the instrument, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views of the Government on the importance of the matters being delegated by the Parliament.

## **DELEGATED POWERS**

### **Section 11(1) – Places at which inquiries may be held**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish statutory instrument  
**Parliamentary procedure:** Affirmative

#### *Provision*

8. This provision permits the Scottish Ministers to make regulations to designate places at which a sheriff court may be held for the purposes of holding an FAI. Subsection (1) makes it clear that these places will be additional to the places already designated for the holding of sheriff courts under the Courts Reform (Scotland) Act 2014. “Places” in this sense means the towns and cities where sheriff courts are held – it does not mean specific buildings. It therefore follows that a sheriff court may be held in a building within a sheriff court district which is not normally used for court purposes and this existing law has already permitted FAIs to be held in ad hoc locations such as the Council Chamber in, for example, Aberdeen City Chambers and the Maryhill Community Centre in Glasgow. Subsection (1) will permit places to be designated for the holding of FAIs where there is no sheriff court.

9. Since the Scottish Courts and Tribunals Service (SCTS) has the statutory responsibility of providing property for the Scottish courts under section 61(1) of the Judiciary and Courts (Scotland) Act 2008, the Scottish Ministers will only make regulations under subsection (1) following the submission of a proposal by SCTS – with the agreement of the Lord President – for the designation of a place for the holding of FAIs under subsection (3), but this procedure will be subject to consultation with appropriate persons under subsection (4).

10. Given the statutory responsibility which the Lord President has for the efficient disposal of business in Scotland’s courts under section 2(2) of the 2008 Act, and the equivalent responsibility of SCTS set out above, the Scottish Ministers must obtain the consent of both the Lord President and SCTS under subsection (7) before making regulations to designate places for the holding FAIs under the Bill.

11. By virtue of subsection (8) regulations may include certain ancillary provision which may be required.

#### *Reason for taking power*

12. At present, under section 1(1) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (“the 1976 Act”), an FAI is required to be held in the sheriff court in the district with which the Procurator Fiscal decides the death appears to be most closely connected, which restricts the options of places for the hearing to be held. The removal of this restriction is proposed, so that an FAI may be held in the most appropriate accommodation in any sheriffdom. Under section 12(2) of the Bill the Lord Advocate may choose the sheriffdom in which the proceedings are to be held, after consulting SCTS.

13. Lord Cullen recommended that FAIs should be taken out of court buildings into other accommodation more suitable for such proceedings. He suggested that an FAI should, where possible, not be held in a sheriff courtroom, but in other appropriate premises; and, where it was unavoidable that the FAI should be held in a courtroom, care should be taken to select one with the least connection with criminal proceedings.

14. SCTS have previously held larger, long running FAIs outwith court buildings, such as that into the 2009 Super Puma crash which was held in the Council Chamber of Aberdeen City Chambers. Currently non-court premises are only used to accommodate longer and more high-profile FAIs. The use of such ad hoc accommodation could, however, be extended for use in greater numbers of FAIs ensuring that more FAIs could be taken out of court rooms as recommended by Lord Cullen.

15. This power is required to permit the Scottish Ministers to designate places for the holding of FAIs outwith existing sheriff courts and sheriff court districts in order to build in more flexibility into the system and to possibly permit FAIs to be held more quickly than might be the case if the inquiry had to wait until capacity can be found in a local sheriff court.

### ***Choice of procedure***

16. As this power relates to the choice of accommodation for FAIs which is additional to, and separate from, locations where there is already a sheriff court, and because it may oblige bereaved families and witnesses to travel further than might otherwise be the case (though in some circumstances such persons could benefit from reduced travel distances), the Scottish Government believes that it is appropriate that this power is subject to affirmative procedure.

17. The broadly comparable power in section 2 of the Courts Reform (Scotland) Act 2014 (Power to alter sheriffdoms, sheriff court districts and sheriff courts) is also subject to affirmative procedure.

### **Section 34(1) – Power to regulate procedure etc.**

**Power conferred on:** The Court of Session  
**Power exercisable by:** Act of sederunt  
**Parliamentary procedure:** Laid-only

### ***Provision***

18. Section 34(1) provides powers for the Court of Session to make rules by act of sederunt to regulate practice and procedure to be followed at FAIs in the sheriff court. This section replaces section 7 of the 1976 Act, widening the powers available to the court with the aim of enabling it to make the kind of comprehensive and self-contained powers envisaged by Lord Cullen. The provisions set out a wide enabling power in subsection (1). Subsection (2) puts beyond doubt what the power in subsection (1) includes, but expressly provides that subsection (1) is not limited by the specific examples of the power in subsection (2). The powers set out in section 34 are similar to those set out in sections 103 and 104 of the Courts Reform (Scotland) Act 2014. Sections 15(4) and 17(1) provide for matters which must be contained within FAI

Rules. Further, sections 14(1)(c), 15(1), 16(2)(b), 19(4), 26(4) and (5) and 30(1)(d) describe matters which may be contained within FAI Rules.

19. By virtue of subsection (3) acts of sederunt may include ancillary provision as may be required.

### ***Reason for taking power***

20. The rules of practice and procedure relating to FAIs in the sheriff court relate to the management of such inquiries before the court and rules under which those inquiries must be conducted. They very often deal with administrative matters. As rules of procedure they may require regular amendment to deal with new eventualities or to adapt to changing circumstances. It is therefore considered appropriate that they be set out in secondary legislation, as at present. This is of course the position for the rules of courts and tribunals.

### ***Choice of procedure***

21. This is the main power the Court of Session will use to regulate the practice and procedure to be followed at FAIs across Scotland. To preserve the courts from political interference, in accordance with the principle of the separation of powers, acts of sederunt are not usually subject to Parliamentary scrutiny.

## **Section 39 – Ancillary provision**

**Power conferred on:**           **The Scottish Ministers**  
**Power exercisable by:**       **Regulations made by Scottish statutory instrument**  
**Parliamentary procedure:** **Affirmative/negative**

### ***Provision***

22. Section 39(1) provides that the Scottish Ministers may by regulations make freestanding ancillary provision, namely incidental, supplementary, consequential, transitional, transitory or savings provisions which they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the enacted Bill. Subsection (2) provides that such an order may modify any enactment, instrument or document (including the Bill).

### ***Reason for taking power***

23. The Bill largely replaces the existing legislation underpinning the existing system for FAIs in Scotland. It is therefore necessary to effect the smooth transition from the 1976 Act legislative regime to the new regime set out in the Bill. The Scottish Government considers it appropriate to take power to deal with anything that might be missed, for example interactions with secondary legislation or older statutes or rules of law. Without the power proposed it would be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the scope and policy intentions of the original Bill and this would not be an effective use of Parliamentary or Government resource. This power is broader than the commencement power in section 40. It is possible that the need for transitional and savings

provisions may be identified after the commencement of particular sections and associated with exercise of other ancillary powers when the power in section 40 will no longer be available.

24. It is envisaged that the Bill will be commenced in April 2016.

25. Other such points of fine tuning consistent with the general policy of the Bill, where provision would be outside the Parliament's competence, will be dealt with in the section 104 order referred to in the Policy Memorandum.

### **Choice of procedure**

26. Regulations under this section are subject to the negative procedure except where they add to, replace or omit any part of the text of an Act, in which case they are subject to the affirmative procedure. These procedures provide the necessary safeguards with regard to the type of legislation which can be made. It is common for ancillary powers of this nature to be subject to the proposed levels of scrutiny.

### **Section 40 – Commencement**

**Power conferred on:**           **The Scottish Ministers**  
**Power exercisable by:**       **Regulations made by Scottish statutory instrument**  
**Parliamentary procedure:** **Laid-only**

#### *Provision*

27. Section 40(2) enables the Scottish Ministers to commence the Bill by conferring a power on Ministers, by regulations, to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. Section 40(3) provides that such regulations may include transitional, transitory or saving provision.

#### *Reason for taking power*

28. It is standard for Ministers to have powers over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such a time as the Scottish Ministers consider to be suitable. Transitional arrangements may be required specifically for the commencement arrangements which might be different or discrete from other transitional provision. It is common for there to be both standalone transitional powers and transitional powers forming part of the commencement powers.

#### *Choice of procedure*

29. As is now usual for commencement regulations, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

## **Schedule 1, paragraph 2 – Transitional arrangements**

**Power conferred on:**            **The Scottish Ministers**  
**Power exercisable by:**       **Regulations made by Scottish statutory instrument**  
**Parliamentary procedure:** **Negative**

### ***Provision***

30. The power to regulate procedure in section 34(1) described in paragraphs 16 to 19 is subject to the following transitional arrangements. Paragraph 2 of schedule 1 confers a power on the Scottish Ministers, until such time as the Scottish Civil Justice Council is involved in the making of FAI Rules, to make such rules in regulations.

### ***Reason for taking power***

31. The Bill requires the Court of Session to consult with the Scottish Civil Justice Council when making acts of sederunt which were not prepared in draft by the Council. For the next few years, however, the Scottish Civil Justice Council will be concentrating on reforms under the Courts Reform (Scotland) Act 2014 and the Tribunals (Scotland) Act 2014.

32. Until such time as the Scottish Civil Justice Council is in a position operationally to assume its role in the formulation of FAI Rules, it is considered appropriate to confer a power on the Scottish Ministers to make those rules in regulations. Broadly similar transitional provisions appear in schedule 9 to the Tribunals (Scotland) Act 2014.

33. Before making any such regulations, the Scottish Ministers are required to consult the Lord President of the Court of Session and such other persons as they consider appropriate.

### ***Choice of procedure***

34. It is considered that the negative procedure gives the appropriate level of scrutiny to the exercise of this regulation-making power. This is the procedure applicable in the provisions of the Tribunals (Scotland) Act 2014 referred to. Ultimately, inquiry rules made via acts of sederunt will not be made subject to substantive Parliamentary procedure so the Scottish Government is proposing additional opportunity for scrutiny during the transitional period.

*This document relates to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland)  
Bill (SP Bill 63) as introduced in the Scottish Parliament on 19 March 2015*

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

## **DELEGATED POWERS MEMORANDUM**