This briefing looks at the two bills before the Scottish Parliament which deal with inquiries into deaths. The Scottish Government’s Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill was introduced in the Scottish Parliament on 19 March 2015. Patricia Ferguson MSP has also brought forward a Member’s Bill on the subject. The Inquiries into Deaths (Scotland) Bill was introduced on 1 June 2015.

Both bills propose to reform the legislation governing Fatal Accident Inquiries (FAIs) and would repeal the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. The main issues addressed in the bills are:

- the circumstances in which mandatory FAIs should be held
- the role bereaved relatives should play in the FAI process
- how to deal with delays between a death and an FAI being held, and
- how to make the recommendations of sheriffs following an FAI hearing more effective.

Both bills would enable discretionary FAIs to be held when people resident in Scotland die abroad. Both also make provision for discretionary FAIs for service personnel who die abroad.
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EXECUTIVE SUMMARY

Introduction

There are two bills currently before the Scottish Parliament which propose to reform the Fatal Accident Inquiry (FAI) process. The Scottish Government has introduced the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill. Patricia Ferguson has also introduced a Member’s Bill on the subject – the Inquiries into Deaths (Scotland) Bill.

The Justice Committee is the lead committee at Stage 1 for both bills.

Background

FAIs are held to establish the circumstances surrounding certain deaths. They are presided over by sheriffs. The sheriff may make recommendations aimed at preventing future deaths in similar circumstances.

Under the current law, mandatory FAIs must be held where someone dies in legal custody, or someone dies in an accident related to their work.

An FAI can also be held where a death is sudden, suspicious, unexplained or gives rise to serious public concern. The Lord Advocate (through the Crown Office and Procurator Fiscal Service, or COPFS) has discretion to hold an FAI in these circumstances where he decides it is “expedient in the public interest”.

The Lord Advocate also has discretion not to hold an FAI (even a mandatory FAI) if the circumstances of the death have been adequately established in related criminal proceedings.

Around 50 to 60 FAIs are held each year. COPFS carries out investigations into the circumstances of deaths in significantly more cases – approximately 5,500 each year.

Human rights considerations

Article 2 of the European Convention on Human Rights creates a right to life. The European Court of Human Rights has interpreted this to include a duty on states to investigate loss of life in certain circumstances. There are procedural standards which such investigations must meet, but it is otherwise up to individual governments to decide how the right should be implemented.

The Cullen Review

Lord Cullen was asked by the Scottish Government to conduct a review into FAI legislation. The review report was published in 2009. Several administrative recommendations flowing from the review have already been implemented. However, many recommendations require primary legislation.

The Scottish Government Bill would implement, broadly, Lord Cullen’s recommendations, although there are several which the Scottish Government does not support. Ms Ferguson’s Bill would go beyond the Cullen Review in a number of areas.
The Scottish Government Bill

The main areas where the Scottish Government proposes to reform the law are as follows:

- **Mandatory FAIs** – updating the definition of legal custody to include any death while detained by the police and requiring a mandatory FAI where a child dies in secure accommodation.

- **Discretionary FAIs** – enabling an FAI to be held where a Scottish resident dies outside the UK and their body is repatriated to Scotland.

- **Role of the Family** – requiring the Lord Advocate, on request, to give written reasons for a decision not to hold an FAI.

- **Delay** – introducing a requirement to hold a preliminary hearing in advance of an FAI and encouraging the sharing and agreeing of evidence in advance.

- **Sheriffs’ recommendations** – creating an obligation to respond to a sheriff’s recommendation and requiring the Scottish Courts and Tribunals Service to publish responses.

- **Other matters** – more freedom in choice of location and venue for an FAI; allowing FAIs to be re-opened or reconvened; and enabling sheriffs and summary sheriffs to be designated as specialists.

**Patricia Ferguson’s Bill**

Ms Ferguson’s Bill would go beyond the Scottish Government’s Bill in several areas. These include:

- extending the mandatory categories of death inquiries to cover all work-related deaths (including those from industrial diseases and exposure to hazardous substances) as well as some other categories,

- requiring the Lord Advocate to give inquiry participants written reasons for a number of decisions, including the decision not to hold an inquiry,

- creating time limits for the Lord Advocate to apply for death inquiries, with the intention of speeding up the process,

- strengthening the process for sheriffs’ recommendations, including making them legally enforceable in certain circumstances, and

- clarifying the role of death inquiries in preventing future deaths.
INTRODUCTION

There are two bills before the Scottish Parliament which deal with Fatal Accident Inquiries (FAIs). Both would repeal current legislation and replace it with new provisions.

The Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill ("the Scottish Government Bill") was introduced in the Scottish Parliament on 19 March 2015 by Michael Matheson MSP. It is a Government Bill. The Bill as introduced is accompanied by a Policy Memorandum and Explanatory Notes.

The purpose of the Scottish Government’s Bill is to modernise the law surrounding the holding of FAIs in Scotland. It implements, broadly, the recommendations of the Review of the Fatal Accident Inquiry Legislation (2009), led by Lord Cullen (henceforth “the Cullen Review”).

The Scottish Parliament’s Justice Committee was designated the lead committee at Stage 1. It published its Stage 1 Report (2015a) on the bill on 1 July 2015. The Justice Committee’s website contains further details of its scrutiny of this bill at Stage 1.

The Inquiries into Deaths (Scotland) Bill ("Ms Ferguson’s Bill") is a Member’s Bill. It was introduced in the Scottish Parliament on 1 June 2015 by Patricia Ferguson MSP. It is accompanied by a Policy Memorandum and Explanatory Notes.

The purpose of Ms Ferguson’s Bill is also to modernise the FAI process. It takes forward a number of Lord Cullen’s recommendations but also goes beyond them. According to the Policy Memorandum (paragraph 5), the overarching policy objectives of the bill are:

- to extend the scope of mandatory FAIs,
- to place families of the deceased at the heart of the inquiry process, and
- to ensure that lessons are learned from the death.

The Scottish Parliament’s Justice Committee was designated lead committee at Stage 1.

Ms Ferguson’s Bill had not been introduced when the Committee heard oral evidence in relation to the Scottish Government’s Bill. However, the issues raised by Ms Ferguson’s draft bill (Ferguson, P. 2013) were considered as part of the evidence gathering process. The Committee heard from Patricia Ferguson herself at its oral evidence session on 9 June 2015 (Scottish Parliament Justice Committee 2015b)

The Committee expects to consider its Stage 1 Report on Ms Ferguson’s Bill in September 2015.

BACKGROUND

ROLE OF THE LORD ADVOCATE

The Lord Advocate is the most senior law officer for the Scottish Government. He advises the Scottish Government in civil and criminal legal matters. He is also responsible for the prosecution of crime and the investigation of deaths in Scotland.

The Lord Advocate is supported in his role by the Crown Office and Procurator Fiscal Service (COPFS). Procurators fiscal prosecute crime. They also have a long-standing, traditional role in
investigating deaths in Scotland. Death investigations may take place even where there is no expectation that a death was the result of criminal behaviour, or that an FAI will take place.

Procurators fiscal lead evidence at FAIs on behalf of the Lord Advocate. Decisions to be made by the Lord Advocate are often delegated to COPFS.

**FATAL ACCIDENT INQUIRIES – THE CURRENT LAW**

The current law governing FAIs is to be found in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. Both the Scottish Government’s Bill and Ms Ferguson’s Bill would repeal and replace the 1976 Act.

**When an FAI is held**

An FAI – known as a mandatory FAI – must be held where a death occurs in Scotland:

- as a result of a work-related accident, or
- when the deceased was in legal custody at the time of their death.

The Lord Advocate also has the discretion to hold an FAI into a death which is sudden, suspicious, unexplained or has occurred in circumstances which give rise to serious public concern. He can do this where such an inquiry would be “expedient in the public interest”.

The Lord Advocate can decide not to hold an FAI – even a mandatory one – where he is satisfied that the circumstances of death have been sufficiently established in related criminal proceedings. The Lord Advocate can also decide not to hold an FAI in such circumstances where inquiries have been carried out by the Health and Safety Executive, the Office of Nuclear Regulation, or under the Gas Act 1965.

Section 9 of the 1976 Act specifically extends the FAI regime to deaths relating to natural resource extraction in the North Sea. This means that deaths relating to accidents in the oil and gas sector are usually investigated through an FAI.

**How an FAI is conducted**

The procurator fiscal for the district most closely connected to the circumstances of the death is responsible for carrying out an investigation and for presenting evidence about the event to the FAI. A sheriff presides over the FAI.

The spouse of the deceased, or the nearest relative, is also entitled to present evidence and cross-examine witnesses at an FAI. An employer can also participate where appropriate, as can other interested parties with the permission of the sheriff.

There are specific procedural rules which apply to FAIs – the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977. However, the 1976 Act also makes provision for civil court rules (the “Ordinary Cause Rules”) to apply to proceedings in relation to matters such as contempt of court and the attendance of witnesses.

It is generally considered that an FAI is an “inquisitorial” process. This means that the sheriff is required to take an active role in ensuring that the facts are established (for example, by calling for evidence on a particular subject to be led). Criminal and civil legal proceedings are

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1 The 1976 Act specifically covers those parts of the UK Continental Shelf to which the law of Scotland applies.
considered to be “adversarial”, in that it is up to the lawyer representing one party to challenge the evidence of the other party.

The role of an FAI is to establish the facts, rather than to apportion blame or find fault. However, Lord Cullen was keen to put this into context in his review (2009). He stated (paragraph 3.23):

“It is true that an investigation of the circumstances of a death in an FAI may disclose grounds for criticism, from which a basis for alleging fault may be inferred. That may be unavoidable if the FAI is to fulfil its function of investigating the circumstances of the death.”

**What an FAI establishes**

The role of an FAI is set out in the 1976 Act. It is to establish, so far as is possible:

- where and when the death, and any accident resulting in the death, took place,
- the cause(s) of death and any accident resulting in the death,
- whether there were reasonable precautions which could have been taken to avoid the death,
- whether there were any defects in any “system of working” which contributed to the death, and
- any other facts which are relevant to the circumstances of the death.

The sheriff in charge of the FAI makes a determination covering as many of these matters as are relevant in the circumstances. Determinations which are of public interest or relate to a significant point of law are currently published on the Scottish Courts and Tribunals Service’s (SCTS) website.

In-keeping with its inquisitorial nature, it is not possible to appeal a decision in relation to an FAI – for example the findings of the sheriff or a decision by the Lord Advocate not to hold an FAI. However, such decisions can be the subject of a judicial review.

Judicial review looks only at the procedural aspects of an official decision. It is, broadly, possible to challenge a decision by way of judicial review where it is argued that:

- the decision-maker acted unlawfully
- there was procedural unfairness in reaching the decision, or
- the decision was so unreasonable as to be irrational.

The SPICe briefing Judicial Review (Harvie-Clark 2009) provides more information.

**How an FAI relates to other court proceedings**

The sheriff’s determination in an FAI is not admissible in evidence in any other court proceedings which flow from the death. An example might be a civil claim for compensation as a result of negligence.

However, the evidence led at an FAI is in the public domain and can therefore be used in other court proceedings. For example, evidence led at an FAI may be used to challenge alternative
claims made in a negligence case. An FAI may also establish facts which can then be used to decide whether a civil court case should be pursued.

The fact that someone has given evidence at an FAI does not prevent criminal charges being brought against them. However, no witness at an FAI can be compelled to answer any questions which might imply that they are guilty of a criminal offence. This, some commentators argue, limits the usefulness of holding an FAI before any criminal proceedings have been concluded.

FAIs are not usually held until after any related criminal proceedings have been concluded. There is concern that discussion of the factors contributing to a death in advance of criminal proceedings may “prejudice” a trial. In other words, jury members may form a view of how a death happened from information discussed at an FAI and may not therefore come to any criminal trial with an open mind on the issue. The fact that the Lord Advocate can decide not to hold an FAI where the circumstances of death have been adequately established in criminal proceedings is also a factor in this practice.

Statistics

According to the Policy Memorandum (paragraph 8), approximately 11,000 deaths are reported to the Procurator Fiscal each year. Death investigations are carried out by COPFS in roughly half of these cases – approximately 5,500.

Of these, around 50 to 60 progress to an FAI each year. It is thought (Cullen 2009) that sheriffs make recommendations relevant to other people or organisations in about one third of FAIs – or approximately 20 FAIs per year.

DEATHS OF SERVICE PERSONNEL ABROAD

The 1976 Act did not originally contain any legal power for the Lord Advocate to investigate deaths which occurred outside Scotland. This became a particular issue during the Iraq and Afghanistan Wars.

Coroner’s Inquests – under the English system of investigating deaths – were held when the bodies of service personnel who had been killed in the conflicts were repatriated to the UK. This was because repatriation was always to the RAF bases at Lyneham and Brize Norton in the south of England. The families of Scottish-based service personnel had to travel to England if they wished to attend the hearings. A Guardian article provides more information.

The Coroners and Justice Act 2009, enacted by the Westminster Parliament, enabled the deaths of service personnel abroad to be investigated under the FAI system.

It applies to those on active service abroad, those engaged in activities to support active service as well as certain civilians involved in military activities. Where such a person’s body is in Scotland or is expected to be repatriated to the UK, the Secretary of State can notify the Lord Advocate that it may be appropriate to hold an FAI. Where such a person’s body is in England or Wales, the Chief Coroner can make the same notification. Equally, the Secretary of State, or the Chief Coroner, can decide that a Coroner’s Inquest is more suitable.

The 2009 Act also amended the 1976 Act to create parallel powers to investigate deaths of service personnel which happen abroad. The Lord Advocate has discretion to hold an FAI where:

- the death occurs in legal custody, or
• the death is sudden, suspicious, unexplained or occurs in circumstances such as to give rise to serious public concern.

Otherwise, the usual rules, described above, apply to proceedings.

OTHER INVESTIGATIONS INTO DEATHS

A range of organisations have a role in investigating deaths in Scotland. The roles of the main agencies are summarised below.

It should be noted that many deaths result from a known medical condition and are expected. These would not normally be the subject of further investigation unless there were other concerns about the circumstances of the death. However, deaths in legal custody are always the subject of an FAI, even where they result from a known medical condition.

Crown Office and Procurator Fiscal Service

COPFS, acting on behalf of the Lord Advocate, investigates a large number of deaths every year in the public interest. As noted above, of around 5,500 death investigations per year, only 50 to 60 result in FAIs. Investigations are carried out by a specialist unit within COPFS known as the Scottish Fatalities Investigation Unit. This unit was established as a result of recommendations made in the Cullen Review.

In carrying out its investigations, COPFS will usually review evidence, such as post-mortem and other medical reports. Statements may also be taken from witnesses. Once the evidence has been collected, COPFS will make decisions about how to proceed, such as whether criminal charges should be pursued or whether an FAI should be held.

It is understood (Scottish Government 2015a) that family members are given a point of contact in the procurator fiscal’s office so that they can raise any issues or concerns directly.

COPFS states (Scottish Parliament Public Petitions Committee 2014) that family members have access to the key evidence and input into the decision about whether to hold an FAI. The decision about whether or not to hold an FAI will be explained to the family. In addition, families have access to victim information and advice officers employed by COPFS, who can provide information about the FAI process.

Health and Safety Executive

The Health and Safety Executive (HSE) has a policy of investigating all fatal work-related accidents unless there are specific reasons for not doing so (HSE 2009). However, the HSE will not always be the appropriate agency to carry this out. In particular, local authorities have responsibility for enforcing health and safety obligations in relation to some premises, including offices, shops, hotels and food outlets.

Investigations are carried out to decide:

• what caused the accident
• whether action should be taken to prevent a recurrence or to ensure compliance with the law
• whether existing law or guidance could be improved, and
• what response is appropriate to deal with any breach of the law.
Investigations can involve visiting the scene of the accident, collecting physical evidence and taking witness statements.

Prosecutions in Scotland (unlike in England) can only be carried out by the procurator fiscal in the public interest. It will therefore be up to the procurator fiscal, rather than the Health and Safety Executive, whether criminal charges are actually brought. Evidence collected by the Health and Safety Executive – and any conclusions drawn from it by investigators – may also be presented to an FAI.

The HSE may, separately, hold an inquiry into particular incidents or matters of health and safety. Where such an inquiry has been held in relation to a work-related death in Scotland, the Lord Advocate can decide not to also hold an FAI.

**Healthcare situations**

*NHS bodies*

NHS boards carry out reviews (often referred to as “adverse event reviews” or “critical incident reviews”) where there are concerns about the circumstances of a death. Their purpose is to discover if any lessons for future practice can be learned. In many cases, the fact of the death will also be reported to the procurator fiscal, who may carry out a separate investigation.

NHS boards set their own policies in relation to adverse event reviews so practice varies from area to area. Healthcare Improvement Scotland has an active role in reviewing deaths from suicide and promoting any lessons learned across the NHS.

*Social care bodies*

Local authorities have systems in place to review some deaths, through a critical incident review or multi-agency review type process. However, the approach is not standardised.

The Care Inspectorate regulates social care, social work and child protection services. It is a legal requirement that the death of a person using a care service is reported to the Care Inspectorate. In many cases, the death will also be reported to the procurator fiscal, who may carry out a separate investigation.

*Mental Welfare Commission for Scotland*

The Mental Welfare Commission for Scotland is an independent organisation which works to support the rights of people with mental illness, learning disability and related conditions. It has statutory powers to carry out investigations or hold inquiries where there are concerns about the care or treatment of somebody with a mental illness, learning disability or related condition. Such investigations can be carried out during the lifetime of the person concerned as well as after a death.

**Deaths of children**

Depending on where a child died, there may be a review by a healthcare or social care body. As noted above, these procedures are not standardised.

The Care Inspectorate has a legal duty to review deaths of children who are “looked after” by their local authority. This covers children who are being cared for by foster parents, kinship carers, prospective adopters or in residential accommodation provided by the local authority.

Some children may need residential care because of complex disabilities. Children who live at home may also be “looked after” if they are under the supervision of the social work department.
Where the death of a child results from abuse, the local authority will carry out a “significant case review”. There are systems in place to disseminate lessons learned from such reviews more widely. NHS boards organise reviews into cot death situations, and Healthcare Improvement Scotland co-ordinates all findings.

HUMAN RIGHTS CONSIDERATIONS

The Human Rights Act 1998 creates a duty on public authorities (including the Scottish Government, local authorities and NHS boards) to respect human rights. The Human Rights Act 1998 Act incorporates the European Convention on Human Rights into the law of the UK. In addition, the Scotland Act 1998 requires the Scottish Parliament and Scottish Government to act in a manner which is compatible with European Convention rights.

Article 2 of the Convention provides that “Everybody’s right to life shall be protected by law.” Force which could result in the loss of life should only be used where “absolutely necessary”.

The European Court of Human Rights has interpreted this obligation to include a requirement on the state to investigate loss of life in certain circumstances. This is considered necessary to make the guarantees in Article 2 effective. It is argued that such an investigation enables the enforcement of laws which protect the right to life and ensures agents of the state are accountable for deaths for which they are responsible.

The European Court of Human Rights has also established standards which investigations must meet if they are to discharge the procedural obligation to investigate deaths. It is otherwise up to individual governments to decide how the right should be implemented. Different standards of investigation may be appropriate to different types of deaths. The requirements are that an investigation must:

- be independent
- be effective
- be reasonably prompt
- allow for sufficient public scrutiny, and
- involve the next of kin to an appropriate extent.

In line with the Article 2 requirements, the requirement to investigate particularly applies when the state has a role in the loss of life. Thus, it is generally considered that deaths in custody and deaths at the hands of state agents (such as security forces) must be investigated. Recent Scottish case law has held that Article 2 obligations can apply to healthcare settings in certain circumstances.

THE CULLEN REVIEW

In 2008, the Scottish Government announced that it had asked Lord Cullen (a previous Lord President of the Court of Session) to conduct a review into FAI legislation. The review included a consultation, to which a range of people and organisations responded. More information about the consultation, and the responses to it, is available from the Scottish Government’s website.

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2 From Stair Memorial Encyclopaedia: Human Rights, paragraph 47.
The review report was published in 2009. It contained a number of recommendations to modernise the law and practice surrounding FAIs. The Scottish Government responded to the Cullen Review in 2011.

The main issues covered in the Cullen Review were:

- extending the grounds for mandatory inquiries,
- enabling FAIs to be held where someone has died abroad and the body is repatriated to Scotland,
- properly resourcing COPFS to carry out FAI work and establishing a central team to coordinate support and collect performance information,
- improving the procedure at FAIs to minimise delays – including using preliminary hearings to set timescales and agree evidence,
- improving the experience of the deceased’s relatives by providing more support and information,
- making legal aid available to relatives of the deceased if they met the financial eligibility criteria, without the need to justify whether it was “reasonable” to grant it,
- making sheriffs’ determinations more effective by, for example, publishing them and requiring organisations to respond to them, and
- allowing an FAI to be re-opened, or a new one to be held, if fresh evidence becomes available.

Some recommendations – such as creating a central team at COPFS – can be taken forward administratively. The Scottish Government states that these have already been implemented. However, many recommendations require to be taken forward via primary legislation.

Both the Scottish Government Bill and Ms Ferguson’s Bill would implement most of Lord Cullen’s recommendations. However, there are several recommendations with which the Scottish Government does not agree. These are not being taken forward in the Scottish Government Bill. They are discussed in more detail below.

- **Extending the mandatory categories of FAI** to cover the deaths of children living in residential establishments and situations where the deceased was subject to compulsory detention by a public authority at the time of death. The latter category would cover those detained under mental health legislation.

- **Holding early hearings in relation to mandatory FAIs** – the purpose of such a hearing would be for the Procurator Fiscal to provide information about the progress of the investigation. Lord Cullen envisaged that it would take place within three months of the death.

- **Legal aid for relatives at an FAI** without the need to demonstrate that it is “reasonable” in the circumstances for legal aid to be granted.

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4 A residential establishment is residential accommodation for children and young people. It may be provided by a local authority or a third party. Children may be in a residential establishment because there is no one to care for them at home or because they have complex disabilities.
• **The publication of responses to sheriffs' recommendations** on the Scottish Government’s website and in an annual report to the Scottish Parliament.

Patricia Ferguson’s Bill would require mandatory FAIs where the deceased was detained by a public authority at the time of death (as well as in other circumstances). However, the requirement for a mandatory FAI would not extend to the deaths of children in residential establishments.

Ms Ferguson’s Bill contains an enabling power which would allow the Court of Session to make rules creating a financial assistance scheme to pay for parties to be represented at a death inquiry. Such a scheme would be entirely separate from the legal aid system.

**PREVIOUS SCOTTISH PARLIAMENT CONSIDERATION**

The Scottish Parliament has taken an active interest in FAIs over its lifetime. The Scottish Government’s announcement that Lord Cullen was to lead a review into existing legislation was followed by a plenary debate (27 March 2008). The main issues covered in that debate were:

- the need for FAIs to be extended so that the deaths of Scottish-based military personnel who die abroad could be investigated more effectively,
- the need for the process to more closely align with interests of bereaved families,
- the need to ensure that sheriffs’ determinations were acted upon,
- the problem of delays, with some MSPs expressing concern about the resourcing of COPFS,
- whether legal aid should be more easily available to bereaved families, and
- the need to consider whether there should be more mandatory categories of FAI.

The Scottish Parliament has also considered a number of petitions on the issue of FAIs. The petitions and the main concerns of the petitioner are listed in the table below.
<table>
<thead>
<tr>
<th>Petition details</th>
<th>Main concerns</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>PE 1567 (27 April 2015) calls for changes to the way unascertained deaths, suicides and fatal accidents are handled.</td>
<td>• that not enough is done to learn lessons from deaths where the cause of death is categorised as unascertained</td>
<td>Petitioner wants a system to appeal or review a COPFS decision to categorise the cause of death as unascertained or suicide. She also wants families to be more included in the decision-making process.</td>
</tr>
<tr>
<td>PE 1501 (13 December 2013) calls for a mandatory inquiry into deaths judged to be self-inflicted or accidental.</td>
<td>• that it is not possible for families to effectively challenge a COPFS decision, following a death investigation, that a death is likely to have been self-inflicted or accidental</td>
<td>The petitioner’s proposals have developed during the course of the petition. The most recent submission (Graham, S. 2015) calls for families to have access to all the evidence gathered by the police or COPFS as part of any investigation.</td>
</tr>
<tr>
<td>PE 1280 (5 September 2009) calls for FAIs to be held when a person from Scotland dies abroad.</td>
<td>• that the 1976 Act does not allow FAIs to be held when someone dies outside Scotland, meaning that there may be no investigation into their death</td>
<td>Petitioner wants the 1976 Act to be amended to require an FAI to be held when a person from Scotland dies abroad. This would be taken forward in both bills.</td>
</tr>
<tr>
<td>PE 1332 (4 June 2010) called for COPFS to be able to investigate suspicious deaths retrospectively.</td>
<td>• that there is no publically accessible investigation into some deaths, even where the circumstances are suspicious</td>
<td>Petition closed after COPFS confirmed that it will investigate suspicious deaths where there is new evidence.</td>
</tr>
<tr>
<td>PE 841 (21 April 2005) called for the 1976 Act to be amended to require mandatory FAIs in the case of deaths caused by careless driving.</td>
<td>• that lessons could be learned from road deaths if FAIs were conducted</td>
<td>Petition closed after the Justice 1 Committee wrote to the Lord Advocate asking for more information about the petitioner’s concerns.</td>
</tr>
<tr>
<td>PE 767 (14 September 2004) called for a review of the effectiveness of the 1976 Act.</td>
<td>• that recommendations made by a sheriff have no legal standing and therefore may not be implemented</td>
<td>Petition closed after Scottish Government announced Cullen Review.</td>
</tr>
<tr>
<td>PE 324 (11 December 2000) called for an FAI to be held into a particular death, and for a right of appeal against the Lord Advocate’s decision not to hold an FAI.</td>
<td>• that there was no way to challenge the Lord Advocate’s decision not to hold an FAI</td>
<td>Petition closed after Justice 2 Committee agreed that issues raised would be investigated as part of its inquiry into COPFS.</td>
</tr>
</tbody>
</table>
THE SCOTTISH GOVERNMENT BILL

The Scottish Government states (Policy Memorandum, paragraph 2) that the policy objectives behind its bill are to reform and modernise the law in relation to FAIs. It is part of the Scottish Government’s “Making Justice Work” initiative. This aims to deliver high quality, affordable and accessible justice in Scotland.

The Scottish Government consulted on the proposals which informed the bill in 2014 (2014a). An analysis of responses to the consultation (Scottish Government 2014b) is also available. Consultation responses from those organisations which agreed to their details being made public can be accessed on the Scottish Government’s website.

The Scottish Government Bill would largely implement those recommendations of the Cullen Review which require primary legislation. The areas where the Scottish Government has chosen to diverge from Lord Cullen’s recommendations are discussed above.

The main reforms taken forward in the Scottish Government Bill are as follows:

- **Mandatory FAIs** – updating the definition of legal custody to include any death of a person while detained by the police and requiring a mandatory FAI where a child dies in secure accommodation.

- **Discretionary FAIs** – enabling an FAI to be held where a Scottish resident dies outside the UK and their body is repatriated to Scotland.

- **Role of the Family** – requiring the Lord Advocate, on request, to give written reasons for a decision not to hold an FAI.

- **Delay** – introducing a requirement to hold a preliminary hearing in advance of an FAI and encouraging the sharing and agreeing of evidence.

- **Sheriffs’ recommendations** – creating an obligation to respond to a sheriff’s recommendation and requiring SCTS to publish responses.

- **Other matters** – more freedom in choice of location and venue for an FAI; allowing FAIs to be re-opened or reconvened; and enabling sheriffs and summary sheriffs to be designated as specialists.

PATRICIA FERGUSON’S BILL

Patricia Ferguson MSP has brought forward a Member’s Bill which also seeks to reform the FAI process. The bill would implement a number of Lord Cullen’s recommendations but would also go beyond them. The overarching policy objectives for the Bill are to place the deceased’s family at the heart of the process and to ensure that lessons are learned from deaths.

Ms Ferguson has consulted (Ferguson, P. 2013) on her proposals and produced an analysis of the responses (Ferguson, P. 2014).

Ms Ferguson’s Bill does not use the term Fatal Accident Inquiry. It refers instead to inquiries. The term “death inquiry” is used in this briefing.

The main areas where Ms Ferguson’s Bill goes beyond the Scottish Government’s Bill and the Cullen Review recommendations are summarised below:
• **Mandatory FAIs** – extending the mandatory categories of death inquiry to cover all work-related deaths (including those from industrial diseases and exposure to hazardous substances) as well as some other categories.

• **Role of the family** – requiring the Lord Advocate to give written reasons to inquiry participants for a number of decisions, including the decision not to hold an inquiry.

• **Delays** – creating time limits for the Lord Advocate to apply for death inquiries with the intention of speeding up the process.

• **Sheriffs’ recommendations** – making sheriffs’ recommendations legally binding (subject to further hearings and a right of appeal).

• **Lessons learned** – clarifying the role of death inquiries in preventing future deaths.

Rule 9.14.13 of the [Scottish Parliament’s procedural rules](https://www.parliament.scot/) enables the Scottish Government to prevent a Member’s Bill from proceeding. This can happen where the Scottish Government notifies the member that it intends to bring forward legislation to give effect to the member’s final proposal during that Session.

The Scottish Government has not given notice in relation to Patricia Ferguson’s Member’s Bill. This is because the Scottish Government does not support – and therefore will not be taking forward – a number of the proposals in Ms Ferguson’s Bill (Scottish Government 2015b).

### KEY ISSUES

The key issues in relation to reform of the FAI process are discussed below.

### MANDATORY FAIS

#### The Cullen Review

The Cullen Review recommended that the death of any child looked after in a “residential establishment” (see above) should trigger a mandatory FAI. This would include children in care for a variety of reasons, including because they had complex disabilities.

The Cullen Review also recommended that mandatory FAIs should be held where someone is, at the time of their death, subject to compulsory detention by a public authority. This would include detention under mental health legislation, as well as other forms of detention.

#### The Scottish Government Bill

Section 2 of the Scottish Government Bill would require a mandatory FAI to be held where a death occurs as a result of an accident at work or in legal custody.

The definition of legal custody would be updated to ensure that any death while someone is detained by the police – in any location – is covered. It would also explicitly include children who die while being kept in secure accommodation.

Secure accommodation is accommodation in a residential establishment (which may be provided by a local authority or a third party) where a child’s liberty is restricted. Children are placed in secure accommodation as a result of a Children’s Hearing. Children may be referred to a Children’s Hearing because they have committed an offence or because there are concerns about the child’s welfare.
The Scottish Government Bill would not extend mandatory FAIs to cover children who die in residential establishments more generally, or people who are, at the time of their death, subject to compulsory detention by a public authority. The Scottish Government stated in its response to the Cullen Review (2011) that it did not agree with holding compulsory FAIs in such a wide range of cases. It argued that such an extension would lead to unnecessary hearings where there is no likelihood of learning anything useful.

Several witnesses to the Justice Committee raised concerns that the procedural requirements to ensure human rights compliance for death investigations might not be in place in every case of a death while detained by a public authority. There was particular concern about how the deaths of those detained under mental health legislation were investigated in practice.

The Mental Health (Scotland) Act 2015 places a duty on the Scottish Government to review the arrangements in place for investigating deaths of those receiving hospital treatment for mental health problems. The Scottish Government is required to carry out the review within three years of the relevant section coming into force. The section is not yet in force.

Financial Memorandum

The Financial Memorandum which accompanies the Scottish Government’s Bill acknowledges that it is difficult to predict the impact of the bill’s provisions on the number of FAIs to be held. This is because the number of FAIs held fluctuates considerably from year to year (Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill Financial Memorandum, paragraph 12).

It is expected that requiring a mandatory FAI where a child dies in secure accommodation will result in no more than one or two extra FAIs every few years (Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill Financial Memorandum, paragraph 38).

Stage 1 Report

The Justice Committee’s Stage 1 Report (Scottish Parliament Justice Committee 2015a) looked at this issue. The Committee asked the Scottish Government to give further consideration to whether mandatory FAIs should be held into the deaths of looked-after children and those detained under mental health legislation. It noted that the Lord Advocate could be given discretion not to hold an FAI in certain circumstances.

Ms Ferguson’s Bill

Patricia Ferguson’s Member’s Bill would extend the circumstances when a work-related death triggers a mandatory death inquiry. These would include deaths from industrial diseases (for example, emphysema, asbestosis and certain cancers). Deaths from work-related exposure to hazardous substances (covering radiation and certain chemicals) would also result in a mandatory death inquiry.

In addition, Ms Ferguson’s Bill (section 3) would require a mandatory death inquiry where someone died when they were:

- in legal custody
- subject to compulsory detention by a public authority
- subject to a compulsory treatment order (under mental health legislation), regardless of whether they were detained in a hospital

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• a voluntary patient receiving treatment for a mental disorder in hospital
• a child requiring to be detained in secure accommodation

The bill goes on to define compulsory detention by a public authority to include compulsory detention under mental health legislation and compulsory detention for public health reasons (ie. quarantine).

The Lord Advocate would have discretion not to hold a mandatory inquiry in certain circumstances, including where there had been criminal proceedings. In order to exercise this discretion, the Lord Advocate would have to be satisfied not only that the circumstances of the death had been sufficiently established, but that no further lessons could be drawn from the death (section 9(2)).

Where the death was caused by an industrial disease or exposure to a hazardous substance, the Lord Advocate would be given additional discretion (section 9(5)). He would be able to decide not to hold a death inquiry where:

• the method and circumstances of exposure to the disease or substance were well known in the industry in question, and
• he was satisfied that there were no further lessons to be learned.

The Financial Memorandum (Inquiries into Deaths (Scotland) Bill Financial Memorandum, paragraph 51) estimates that the extensions to the requirement to hold a mandatory FAI would result in no more than one or two additional FAIs per year.

DISCRETIONARY FAIs

The Cullen Review

The Cullen Review recommended that it should be possible to hold an FAI where someone normally resident in Scotland dies abroad and their body is repatriated to Scotland.

Scottish Government Bill

Section 6 of the Scottish Government Bill would enable a discretionary FAI to be held where a death occurs outside the UK. This would be possible where:

• the deceased was ordinarily resident in Scotland at the time of death, and
• the person’s body is repatriated to Scotland.

The Lord Advocate would exercise his discretion in relation to whether an FAI should be held on the basis of the following criteria:

• that the circumstances of the death had not been sufficiently established in other investigations
• that there is a real prospect that those circumstances would be established at an FAI, and
• that it is in public interest for an inquiry to be held.
Section 7 of the Scottish Government Bill would make separate provision for the deaths of service personnel. It would re-enact the existing law (described above).

Financial Memorandum

The Financial Memorandum estimates that the ability to hold FAIs into deaths which occur outside the UK will generate no more than one extra FAI per year (Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill Financial Memorandum, paragraph 53). COPFS also estimates it will carry out a maximum of 50 additional death investigations as a result of the proposals. The additional cost of investigating these deaths is estimated to be around £157,350 per year.

Stage 1 Report

The Justice Committee (Scottish Parliament Justice Committee 2015a) welcomed the ability to hold FAIs into deaths which occurred abroad. It recommended that the Scottish Government bring forward Stage 2 amendments to enable an FAI to be held where the body had not been repatriated, in exceptional circumstances.

Ms Ferguson’s Bill

Patricia Ferguson’s Bill would also extend FAIs to deaths which occur outwith the UK. Section 5(4) would allow a death to be treated as having occurred in Scotland where:

- the person was ordinarily resident in Scotland at the time of death,
- the body is repatriated to Scotland, and
- the Lord Advocate considers that that death was sudden, suspicious or unexplained, or gives rise to serious public concern, and it is in the public interest for an inquiry to be held.

Ms Ferguson’s Bill also makes provision for death inquiries to be held when service personnel die abroad (section 5(6)).

ROLE OF THE FAMILY

The Cullen Review

Lord Cullen recommended that relatives of the deceased should be provided with written reasons for the Lord Advocate’s decision not to hold an FAI on request. He thought that better explanations of decisions might lead to fewer challenges by judicial review. However, he also thought that relatives may not always want a formal, written decision.

Scottish Government Bill

The support currently provided by COPFS to family members is discussed above.

Section 8 of the Scottish Government Bill would create a duty on the Lord Advocate to provide written reasons for a decision not to hold an FAI, but only where requested to do so by the nearest relative. It would remain open to COPFS staff to explain the decision to the family informally if that was more appropriate in the circumstances.
Stage 1 Report

The Justice Committee recommended that amendments were brought forward at Stage 2 to ensure families were given written reasons for a decision not to hold an FAI, whether or not they requested them. It also noted the importance of involving wider family (and others, such as trade unions) in the FAI process.

Ms Ferguson’s Bill

Patricia Ferguson’s Bill would require the Lord Advocate to give written reasons for a range of decisions. These include:

- that the death is to be investigated by COPFS (section 7)/
- that a death inquiry is to be held in relation to the death (section 7),
- that the Lord Advocate cannot reach a decision on whether to hold a death inquiry because related proceedings (eg. criminal proceedings) are to take place (section 7),
- that a death inquiry is not to be held in relation to the death (section 10),
- that an inquiry is to be held which will look only at some aspects of the death (those aspects which the Lord Advocate does not believe have been fully investigated in other proceedings) (section 10), and
- that it has not been possible to apply for a death inquiry within the three month deadline (section 11).

The people to be informed include: a spouse/partner or nearest relative; an employer (where appropriate); any other relatives of the deceased who have told the Lord Advocate they wish to be kept informed; and anyone else who has notified the Lord Advocate and appears to have an interest in the lessons to be learned.

Ms Ferguson’s Bill would also give the family a right to request that a work-accident death inquiry is held in the specialist personal injury court, unless the Lord Advocate can show good cause for not doing so (section 13)\(^6\). The specialist personal injury court is a sheriff court that deals only with personal injury matters. It is to be presided over by sheriffs with specialist knowledge of this area of law.

DEALING WITH DELAYS

The Cullen Review

Lord Cullen recommended that preliminary hearings should be standard procedure for FAIs. This is taken forward in both the Scottish Government Bill and Ms Ferguson’s Bill. He also recommended that, in the case of mandatory FAIs, there should be an early hearing. This is not being taken forward in either bill.

Lord Cullen made a number of recommendations designed to ensure that COPFS was able to direct appropriate financial and staff resources to supporting FAIs. The Scottish Government states that recommendations around creating a central team within COPFS with responsibility for case management have been taken forward (Inquiries into Fatal Accidents and Sudden

\(^6\) Note that the Scottish Government Bill would allow sheriffs to be designated as specialists in conducting FAIs.
Deaths etc. (Scotland) Bill Policy Memorandum, paragraphs 29 to 33). However, the position regarding financial resources is not clear.

The Scottish Government Bill

Section 14 of the Scottish Government Bill would require the sheriff to “have regard to the desirability of holding the inquiry as soon as is reasonably practicable” when fixing a date for an FAI to start.

Section 15 would create provision for a preliminary hearing to take place before the start of any FAI. The preliminary hearing would deal with a range of procedural issues. These, and the circumstances in which a sheriff can dispense with a preliminary hearing, are to be dealt with in detail in court rules. Lord Cullen argued that a preliminary hearing could be a useful tool in ensuring that an FAI was conducted in an effective and efficient manner.

Lord Cullen also envisaged that the preliminary hearing would provide a forum for the parties to share evidence and witness statements. This would facilitate agreement over the scope of the FAI and whether any matters could be agreed between the parties in advance. Section 17 of the Scottish Government Bill makes general provision for this.

In her evidence session with the Justice Committee, the Solicitor General announced plans to introduce a “milestone charter” (Scottish Parliament Justice Committee 2015c, col 20). This would be a publicly available document committing COPFS to carrying out certain actions within certain timescales. A key commitment would be to hold an early meeting with the family to provide specific information on the progress of the investigation and the likely timescale.

Stage 1 Report

The Justice Committee’s Stage 1 Report (Scottish Parliament Justice Committee 2015a) welcomed proposals for preliminary hearings.

The Justice Committee also welcomed the commitment to introduce a milestone charter. It believed that that the proposed early meeting would bridge the gap between the proposals in the Scottish Government Bill and those who favoured an early hearing (as recommended by Lord Cullen).

Ms Ferguson’s Bill

Patricia Ferguson’s Bill also contains a number of proposals to deal with delays. In particular, it would create specific deadlines for holding death inquiries.

In situations where there is no intention to bring criminal proceedings (or other forms of inquiry), the bill proposes that a death inquiry should start within a year. The Lord Advocate would have six months from the death to notify the relatives as to whether he intended to hold a death inquiry (section 7). He would then have an additional three months to apply to the sheriff for an inquiry (section 11), and the sheriff would have a further three months to hold a preliminary hearing (section 15).

There would be different rules where criminal proceedings (or other forms of inquiry) were taking place. In these circumstances, the Lord Advocate would have three months from the date of conclusion of proceedings to notify the family if he intended to apply for a death inquiry (section 10). He would then have three months to apply to the sheriff for an inquiry (section 11), and the sheriff would have three months to hold a preliminary hearing (section 15).

Where the Lord Advocate was not able to meet the three month deadline for applying for a death inquiry, it would be possible for him to set a later date. He would be required to notify
interested parties of the date and of the reasons why the inquiry could not be held sooner (section 11).

Ms Ferguson’s Bill would also make provision for preliminary hearings to deal with procedural issues (section 15). A preliminary hearing would be required to take place no later than three months after an application for a death inquiry.

SHERIFFS’ DETERMINATIONS

The Cullen Review

Lord Cullen made a number of recommendations in relation to sheriffs’ determinations. These included clarification of what factors should be taken into account when making sheriffs’ recommendations.

Lord Cullen recommended that all sheriffs’ determinations be published on the SCTS website. He also stated that people or organisations who were the subject of a recommendation should be required to respond to the Scottish Government, outlining what they had done to implement it. Such responses were to be published on the Scottish Government’s website, and the Scottish Government was to produce an annual report detailing responses to recommendations.

The Scottish Government Bill

The Scottish Government Bill would update the current law governing the scope of the sheriff’s determination in order to deal with a number of concerns highlighted by Lord Cullen. Section 25 of the Bill details the proposed matters which the sheriff’s determination would cover. These are:

- when and where the death occurred
- when and where any accident resulting in the death occurred
- the cause(s) of death
- the cause(s) of any accident resulting in the death
- any precautions which could reasonably have been taken and which might realistically have resulted in the death being avoided
- any defects in any system of working which contributed to the death or any accident resulting in the death
- any other relevant facts.

Recommendations would be able to be made to participants at the FAI and to organisations or people with an interest in the prevention of deaths in similar circumstances (whether or not they participated in the inquiry).

Section 25 would also make clear recommendations can be made in relation to precautions and defects, even where it would not have been reasonably foreseeable that they would have prevented, or contributed to, the death. This permits the sheriff to employ hindsight when making recommendations.

Section 25 distinguishes between precautions which may have prevented the death which is the subject of the inquiry (subsection (2) and those which might prevent deaths in the future in similar circumstances (subsection (4)).
The Scottish Government has moved away from the publication plans recommended by Lord Cullen.

Section 26 would create an obligation on SCTS to publish all sheriffs’ determinations. A copy of such a determination would also be supplied to each participant at the FAI and each person or organisation to whom a recommendation is made. Other people and organisations would be entitled to receive a copy of the determination.

Section 27 deals with provisions to require compliance with the sheriff’s recommendations. Where a recommendation is addressed to a party to the FAI, they would be required to respond to SCTS within 8 weeks of receiving a copy of the determination. The response would set out how the recommendation was being dealt with. Where the respondent did not intend to implement the recommendation (or implement it in full) the response would be required to set out the reasons for that.

Where a recommendation is addressed to an organisation or person who did not participate in the FAI, they would not be obliged to respond, but could choose to do so.

SCTS would be responsible for publishing responses (although it would be possible for certain information to be withheld). Where an organisation or person does not respond, SCTS would publish notice of that fact.

Financial Memorandum

The Financial Memorandum does not provide details of the costs expected to fall on SCTS as a result of these provisions. However, it does state that these costs are not expected to be significant (Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill Financial Memorandum, paragraph 74).

Stage 1 Report

The Justice Committee (Scottish Parliament Justice Committee 2015a) welcomed the requirement on parties to respond to sheriffs’ recommendations. It considered this to balance the need to ensure compliance with the complexities involved in making sheriffs’ recommendations legally binding.

On balance, the Committee was satisfied with the arrangements in the Scottish Government Bill for publication of responses.

Ms Ferguson’s Bill

Patricia Ferguson’s Bill would also update the law in relation to the scope of sheriffs’ determinations. Section 21 restates (in much the same terms as the 1976 Act) what factors a determination should cover. It also makes clear that sheriffs should use hindsight in deciding what precautions could have been taken to prevent a death, even if such precautions would not have been obvious at the time.

SCTS would be required to send copies of the determination to the Lord Advocate, inquiry participants and any person or organisation to whom a recommendation is addressed. Certain other people would also be entitled to receive copies.

Ms Ferguson’s Bill also contains provisions which would make sheriffs’ recommendations legally enforceable in certain circumstances.

It would be beyond the devolved competence of the Scottish Parliament to require people or organisations to comply with a recommendation which relates to reserved matters. For example,
a sheriff’s recommendation which required a change to health and safety legislation would be beyond devolved competency.

It would also be beyond devolved competency to require action to be taken outside Scotland. Thus, Patricia Ferguson’s Bill only makes those sheriffs’ recommendations which are within devolved competency legally enforceable.

The bill proposes a multi-stage process for making recommendations legally enforceable:

- Before making a recommendation, the sheriff would be required to send the relevant person or organisation a copy of the proposed recommendation and give them an opportunity to be heard at the death inquiry (section 22(4)).

- Parties who were the subject of recommendations would be required to notify the sheriff and other participants to the inquiry that the recommendation had been complied with – or the reasons why it had not been implemented (section 25).

- Where a recommendation has not been implemented (or fully implemented), the sheriff would be able to hold a further hearing (with representations from all interested parties). The sheriff could then make an order requiring the recommendation to be complied with within a specific time frame (section 25).

- It would be a criminal offence not to comply with such an order.

Part 5 of Ms Ferguson’s Bill would provide for an appeals process by which a sheriff’s recommendation could be challenged. Appeal would be possible, with the agreement of the court, to the Sheriff Appeal Court and then to the Court of Session.

The Lord Advocate would be responsible for monitoring responses to sheriffs’ recommendations. He would be required to notify the sheriff (and other inquiry participants) if a party does not respond to a recommendation. This could trigger a further hearing (as discussed above).

Section 23 of Ms Ferguson’s Bill would introduce a system of warning notices in relation to sheriffs’ determinations. The purpose of these would be to give people or organisations advance notice that they are to be the subject of criticism at a death inquiry.

A sheriff would be required to send a warning notice where:

- A person or organisation might be (or has been) criticised during death inquiry proceedings.

- Criticism of a person or organisation may be inferred from evidence heard during the inquiry.

- Criticism of a person or organisation may be inferred from the sheriffs’ determination (or related recommendations).

The warning notice would explain what the criticism relates to, and may highlight facts or evidence which supports it. The person or organisation to whom it is addressed would be invited to make a written statement if they wished to.
SOURCES


Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill: Explanatory Notes (and other accompanying documents) Session 4 (2015). SP Bill 63-EN. Edinburgh: Scottish Parliament. Available at:


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