

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

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 Legislation¹ 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 2011² 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.

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

² <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 recently³, "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

³ 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 21st 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 2008⁴.

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.

Recommendation		Implementation
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
Mandatory FAIs		
4	Maintain provision for mandatory FAIs into work-	Section 2

⁴ <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
The scope of FAIs		
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
Decisions against the holding of an FAI		
11	Written reasons to be provided to relatives when decided not to hold an FAI	Section 8
Crown Office and Procurator Fiscal Service		
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
The proceedings		
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
Determinations		
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
Fresh proceedings		
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 cases⁵ 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—

⁵ 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 Sea⁶, 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

⁶ <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.”⁷

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

⁷ <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 Scotland⁸. 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 responses⁹ and on 21 November 2014 it published an independent analysis by Craigforth¹⁰. 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.

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

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

¹⁰ <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 point¹¹. 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 established¹². 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.

¹¹ http://www.maib.gov.uk/cms_resources.cfm?file=/FlyingPhantom.pdf

¹² <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.¹³

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.

¹³ 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 death¹⁴—

- 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

¹⁴ This list above is not exhaustive, and not necessarily in order

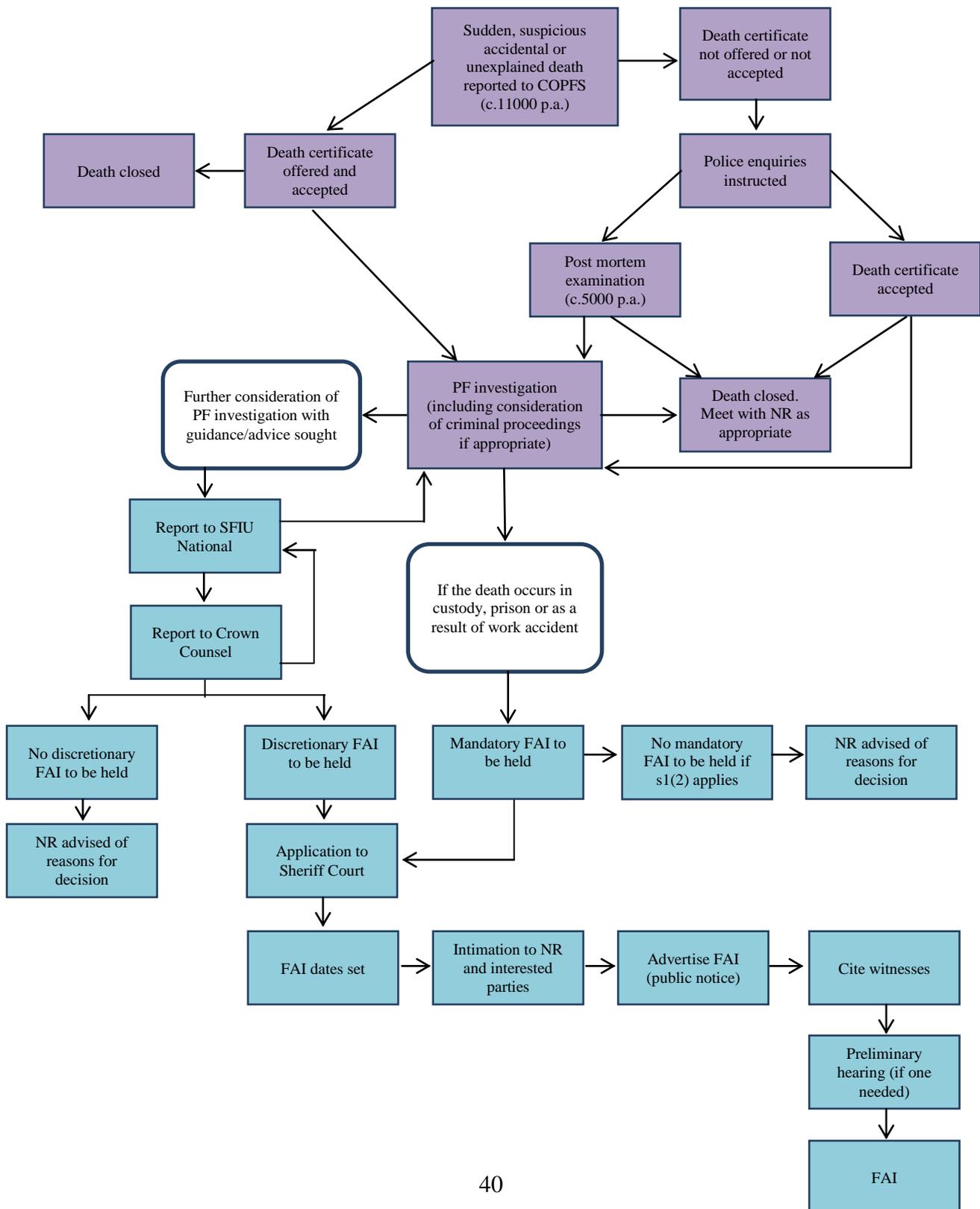
This document relates to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (SP Bill 63) as introduced in the Scottish Parliament on 19 March 2015

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.

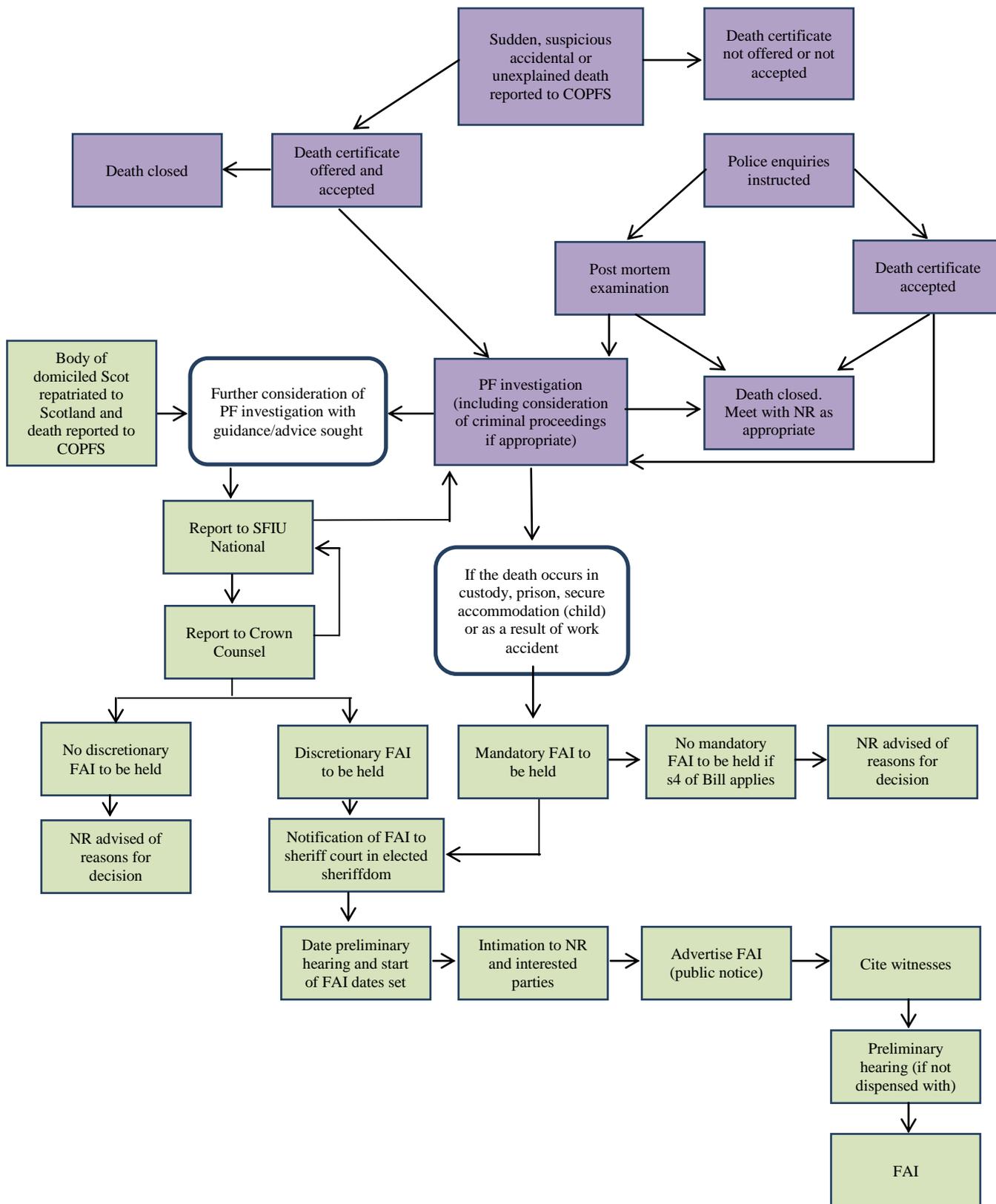
NR = nearest relatives



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

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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