INQUIRIES INTO DEATHS (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Inquiries into Deaths (Scotland) Bill introduced in the Scottish Parliament on 1 June 2015:

- Explanatory Notes;
- a Financial Memorandum;
- Patricia Ferguson’s statement on legislative competence; and
- the Presiding Officer’s statement on legislative competence.

A Policy Memorandum is published separately as SP Bill 71–PM.
EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared in order to assist the reader of the Bill. They do not form part of the Bill and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a provision of the Bill does not seem to require any explanation or comment, none is given.

PURPOSE OF THE BILL

3. The purpose of the Bill is to restate the Fatal Accidents and Sudden Death Inquiry (Scotland) Act 1976\(^1\) ("the 1976 Act") but with amendments to give effect to many of the recommendations of the Report on the Review of Fatal Accident Legislation by Lord Cullen 2009\(^2\) ("the Cullen Report") and certain other amendments which go beyond Lord Cullen’s recommendations.

4. The Scottish Government issued its response to the review in 2011\(^3\), accepting the majority of Lord Cullen’s 36 recommendations. On 19 March 2015, the Scottish Government has introduced a Bill\(^4\) ("the Government’s FAI Bill") which also seeks to restate the 1976 Act but with amendments to give effect to many of the recommendations of the Cullen Report which the Government accepted.

5. For the purposes of this document, the term FAI ("Fatal Accident Inquiry") will be used to describe an inquiry under the 1976 Act and this Bill.

6. The main amendments made in this Bill which go beyond the Cullen recommendations and which are different from the Government’s FAI Bill are—

   - to extend the scope of the investigations and inquiries into deaths to cover work-related deaths resulting from industrial disease or exposure to certain substances due to the nature of person’s employment. In other words, such investigations and inquiries will not be limited to fatal accidents where death has resulted from personal injuries caused by an accident,
   - to extend the category of death in legal custody (in relation to which an FAI is mandatory) to include individuals detained by reason of a compulsory treatment order, voluntary in-patient treatment for a mental disorder or a child protection or supervision order,

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\(^1\) Fatal Accidents and Sudden Death Inquiry (Scotland) Act 1976 (c.14)
\(^2\) http://www.scotland.gov.uk/Publications/2009/11/02113726/11
\(^3\) Scottish Government, Response to the Recommendations from the Review of Fatal Accident Inquiry Legislation: http://www.scotland.gov.uk/Publications/2011/03/18150120/0
\(^4\) Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (SP Bill 63)
These documents relate to the Inquiries into Deaths (Scotland) Bill (SP Bill 71) as introduced in the Scottish Parliament on 1 June 2015

- to provide a statutory timetable for the Lord Advocate to notify the family of the deceased whether and when an application for an FAI will be made and a preliminary hearing held,
- to provide the family of the deceased the right to make submissions on the range and scope of the inquiry at preliminary hearing,
- to make it clear that the investigation and inquiry is not only into the causes of the death but the lessons to be drawn from the death in order to prevent further deaths arising from similar circumstances in the future, and
- to provide that a sheriff’s recommendations as to what action requires to be taken, or not taken, to prevent those future deaths may be addressed to persons who may, or may not, be participants in the FAI and to be enforceable ultimately by criminal sanctions.

PART 1: INVESTIGATION OF DEATHS ETC.

7. This Part re-enacts, with amendments, sections 1(1) and 2 of the 1976 Act. It sets out in sections 2 to 4 what are the cases in which the Lord Advocate is required to carry out an investigation into the circumstances of the death of any person occurring in Scotland. It defines what is meant by such an investigation (section 1(2)). It provides that certain deaths which occur outwith Scotland are to be treated as occurring in Scotland (section 5). It empowers the Lord Advocate to cite witness for precognition (section 6) and requires certain persons to be notified of what the Lord Advocate intends to do (section 7).

Investigation of deaths occurring in Scotland

Section 1 - Investigation of deaths etc.

8. Subsection (1) provides that, where a person has died in Scotland, the Lord Advocate is required to investigate the circumstances of that death in any of the cases mentioned in sections 2 to 4 and may do so in any other case.

9. The 1976 Act conferred the function of investigating these deaths upon “the procurator fiscal for the district with which the circumstances of the death appear to be most closely connected”. However, as procurators fiscairs act on behalf of the Lord Advocate, the Bill confers this statutory function directly upon the Lord Advocate who is responsible for its exercise and who then can decide which procurator fiscal should carry out this function on behalf of the Lord Advocate.

10. Subsection (2) defines what is meant by “the circumstances of a death” for the purposes of the Act. It makes it clear that the investigation has to be not only into such matters as where and when the death took place and the causes of the death but also into the lessons to be drawn from the death in order to avoid future deaths. These are matters upon which the sheriff is required to make a determination under section 21(1) and may make recommendations under section 22.
11. Subsection (2) is new. However, it expresses the principle which is considered to be implicit in the 1976 Act that what is meant by the circumstances of a death must be the same as what the sheriff can determine or make recommendations about at the inquiry.

Section 2 - Work related deaths

12. Section 2 requires the Lord Advocate to investigate work related deaths. Paragraphs 4.7 and 10.4 of the Cullen Report recommended that inquiries into such deaths should continue to be mandatory⁵ but this section extends the scope of what is meant by those deaths.

13. Subsection (1)(a) re-enacts section 1(1)(a)(i) of the 1976 Act by providing that the Lord Advocate must investigate the death where it appears to the Lord Advocate that the death has resulted from personal injuries caused by an accident occurring in Scotland⁶ in the course of that person’s employment or occupation. It extends that provision to cover the case where it is not clear that the death has resulted from such an accident but may have done so.

14. Subsection (1)(b) is new. It requires the Lord Advocate to investigate the case where death has, or may have, resulted from industrial disease or exposure to any substance hazardous to health which is due to the nature of that person’s employment or occupation. In other words, such investigations and inquiries will not be limited to fatal accidents where death has resulted from personal injuries caused by an accident as mentioned in subsection (1)(a).

15. Subsection (2) defines what is meant by “industrial disease” and “a substance hazardous to health.”

Section 3 - Deaths while in legal custody etc.

16. This section requires the Lord Advocate to investigate the death of a person while in legal custody or in certain other forms of compulsory detention, including various kinds of hospital detention, a child required to be kept or detained in secured accommodation, a voluntary patient in a mental hospital or a person detained in service custody; but does not include the circumstances of detention under the Immigration Act.

17. It re-enacts sections 1(1)(a)(ii) and (4) of the 1976 Act but with amendments to give effect to the recommendations in paragraphs 4.14, 4.20, 4.27, 10.5 and 10.6 of the Cullen Report.

18. Subsection (1)(a) requires the Lord Advocate to investigate the death of a person who was, at the time of death, in legal custody. Subsection (2) defines what is meant by legal custody. These provisions re-enact sections 1(1)(a)(ii) and (4) of the 1976 Act. However, the definition of legal custody is updated to refer to being imprisoned or detained in a penal institution (as defined

⁵An inquiry is not strictly mandatory because it is subject to section 9 (exceptions to duty to apply to hold an inquiry).

⁶The reference to an accident occurring in Scotland is, in effect, extended by section 5(2) which provides that an accident which has occurred on the UK continental shelf outwith Scotland is to be treated as having occurred in Scotland.
in subsection (5)), being in police custody, being held in custody on court premises or being detained in service custody premises.

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

20. Subsection (1)(b) requires the Lord Advocate to investigate the death of a person who was, at the time of death, subject to compulsory detention by a public authority within the meaning of section 6 of the Human Rights Act 1998. This is new but gives effect to the recommendations in paragraphs 4.15 to 4.20 of the Cullen Report. Subsection (3) makes it clear that this includes the three categories of court-imposed hospital order mentioned in the Cullen Report, namely a person subject to any form of compulsory detention under the Mental Health (Care and Treatment) (Scotland) Act 2003, an offender subject to a compulsion order authorising the detention of that offender in a hospital under section 57A of the Criminal Procedure (Scotland) Act 1995 and a person subject to compulsory detention for public health reasons.

21. Subsection (1)(c) requires the Lord Advocate to investigate the death of a person who was, at the time of death, subject to a compulsory treatment order, or an interim treatment order, under Part 7 of the Mental Health (Care and Treatment) (Scotland) Act 2003, whether detained in hospital or not. This is an extension of subsection (1)(b) and covers other ways in which a patient can be detained in a hospital for mental treatment.

22. Subsection (1)(d) requires the Lord Advocate to investigate the death of a person who was, at the time of death, a voluntary patient in a hospital for treatment of mental disorder. This represents an extension of subsection (1)(b) and (c).

23. Subsection (1)(e) requires the Lord Advocate to investigate the death of a child, who was, at the time of death, required to be kept or detained in secure accommodation. Secure accommodation is defined in subsection (5) as meaning accommodation provided in a residential establishment approved in regulations under the Public Services Reform (Scotland) Act 2010, for the purpose of restricting the liberty of children. This ensures that the definition will keep pace within whatever is approved in those regulations from time to time. Subsection (1)(e) gives effect to recommendations in paragraphs 4.21 to 4.27 and 10.7 of the Cullen Report.

24. Subsection (4) makes it clear that a person in legal custody or secure accommodation does not require to be in secure accommodation, a penal institution or, as the case may be, service custody premises at the time of death.

25. Accordingly, the Lord Advocate is still required to investigate the death of a person who dies in hospital if that person was at the time of death still serving a custodial sentence.

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7 1998 c. 42
Section 4 - Sudden deaths etc.

26. This section re-enacts section 1(1)(b) of the 1976 Act.

27. The Lord Advocate is required to investigate the death of a person if the Lord Advocate considers that the death was sudden, suspicious or unexplained or occurred in circumstances which give rise to serious public concern, and that it is in the public interest to hold an inquiry.

28. As this case confers various discretions upon the Lord Advocate, subsection (2) makes it clear that this case does not apply to a death which falls within section 2 (work related deaths) or 3 (death in legal custody).

Investigation of deaths treated as occurring in Scotland

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

29. Subsection (1) provides that the death of a person, or an accident, is to be treated as occurring in Scotland for the purposes of the Bill in three situations set out in subsections (2), (4) and (6).

30. Subsection (2) reproduces the effect of section 9 of the 1976 Act as a restatement of reserved law. It operates to ensure that a death or accident is to be treated as having occurred in Scotland if it was connected to certain activities related to the offshore oil and gas industry and took place within the area (defined in subsection (3)) of sea adjacent to Scotland which is treated as being subject to Scottish civil law. The Bill does this by defining the activities and areas regulated by reference to section 11(2) of the Petroleum Act 1998, with the effect that those activities and that area subject to section 11(2) are also covered by the Bill.

31. Subsection (4) provides that the death of a person is to be treated as having occurred in Scotland if the death occurred outwith the United Kingdom, the person was ordinarily resident in Scotland at the time of death, the body has been brought back to Scotland and the Lord Advocate considers that the death falls within section 4 (sudden death etc.)

32. Until now it has only been possible to hold an FAI into a death which occurred in Scotland (other than the deaths of service personnel). Subsection (4) does not apply to deaths in England, Wales and Northern Ireland as such deaths will continue to be subject to the system of coroners’ inquests in those countries. The effect of subsection (5) is that subsection (4) does not apply to deaths of service personnel abroad, which are dealt with in subsection (6).

33. Subsection (6) makes provision with regard to the deaths of service personnel abroad. It is intended to re-enact section 1A of the 1976 Act which was inserted by section 12 of the Coroners and Justice Act 2009.

34. It provides that the death of a person is to be treated as having occurred in Scotland if—
   - the Lord Advocate is notified by the Secretary of State or the Chief Coroner under section 12(4) or (5) of the Coroners and Justice Act 2009 (investigation in Scotland
of deaths of service personnel abroad). This will normally be if it is considered that it is appropriate for the death abroad of armed forces service personnel, or of a civilian subject to service discipline who was accompanying service personnel who were engaged in active service, to be the subject of an FAI rather than a coroner’s inquest. This will normally be where the deceased was domiciled in Scotland, and

- the Lord Advocate considers that the person was, at the time of death, in custody in circumstances analogous to legal custody under section 2 or that the death falls within section 4 (that is sudden, suspicious or unexplained, or occurs in circumstances giving rise to serious public concern). This includes a death abroad whilst detained abroad in premises analogous to service custody premises as defined under the Armed Forces Act 2006.

**Citation of witnesses for precognition**

**Section 6 - Citation of witnesses for precognition**

35. This section re-enacts section 2 of the 1976 Act. It enables the Lord Advocate to cite witnesses for precognition for the purposes of the investigation into a death.

36. When a person fails, without reasonable excuse, to attend for precognition or refuses to answer questions, subsection (4) enables the Lord Advocate to apply to the sheriff for an order and subsection (5) provides that it is an offence for anyone to fail to comply with that order. Subsection (6) provides for penalties for committing that offence.

**Relevant persons to be notified**

**Section 7 - Notification to relevant persons**

37. This section is new.

38. Subsection (1) requires the Lord Advocate to notify relevant persons of certain matters as soon as practicable and in any event within six months after being notified of the death. The matters are whether it is intended to investigate the death and to apply for the holding of an inquiry under the Act and when it is intended to do so or whether it is not possible to do so because criminal or inquiry proceedings of the kind referred to in section 9(3) have commenced and have not been concluded.

39. Subsection (2) provides that these matters may be notified at different times but they all require to be notified within the six-month period.

40. Subsection (3) requires the Lord Advocate to give reasons.\[8\]

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\[8\] Paragraph 5.11 of the Cullen Report recommended that reasons should be given where the Lord Advocate decided not to hold an inquiry. Section 6(3) goes further than this by requiring reasons in every case.
41. Subsection (4) in effect defines who are the relevant persons for this purpose. They also form part of the definition of persons who are entitled to participate in the inquiry proceedings under section 14.

42. Relevant persons are similar to the persons who are, under section 4(2) of the 1976 Act, entitled to appear at the inquiry but they are updated, as the Cullen report recommended, to include civil partners and co-habitants. The description in subsection (4)(b) of a person living with A as if married to A at the time of A’s death will include a same sex couple living together.

43. The definition also preserves the effect of section 4(2) of the 1976 Act providing that, where the inquiry concerns a work related death under section 2, any employer of the deceased and an inspector appointed under section 19 (appointment of inspectors) of the Health and Safety at Work etc. Act 1974 must be notified. In that limited regard, the Bill restates reserved law.

44. The definition also includes any relative of the deceased and person who has an interest in the lessons which might be drawn from the death, if they have notified the Lord Advocate that they wish to be kept informed of the inquiry proceedings and who appear to have an interest in them.

45. Subsection (5) defines various expressions used in that definition, such as relative and nearest known relative

PART 2: APPLICATION TO HOLD AN INQUIRY

Duty to apply to hold an inquiry

Section 8 - Duty to apply to hold an inquiry

46. This section requires the Lord Advocate to apply for the holding of an inquiry, in accordance with sections 12 and 13, into the circumstances of the death if, after investigation, the Lord Advocate remains of the view that the death appears to be a death that falls into any of the cases mentioned in sections 2 to 4.

Exceptions to duty to apply for an inquiry

Section 9 - Exceptions to duty to apply for an inquiry

47. This section makes various exceptions from the duty in section 8 to apply to hold an inquiry. It allows the Lord Advocate to decide that a FAI is not to be held into a death which falls within the categories of death set out in sections 2 or 3.

48. Subsection (2) provides that the Lord Advocate can exercise this discretion only if satisfied that the circumstances of the death have been sufficiently established in the course of certain other proceedings and that no further lessons can be drawn from the death which might be the subject of recommendations by the sheriff under section 22.
These documents relate to the Inquiries into Deaths (Scotland) Bill (SP Bill 71) as introduced in the Scottish Parliament on 1 June 2015

49. The other proceedings which the Lord Advocate is permitted to rely upon are defined in subsection (3). They are criminal proceedings, an inquiry under section 17(2) of the Gas Act 1965, an inquiry under section 14(2A) of the Health and Safety at Work etc. Act 1974, an inquiry under section 85(1) of the Energy Act 2013 and, except in the case of a death of a person required to be detained in service custody premises, an inquiry under section 1 of the Inquiries Act 2005.

50. Inquiries under the 2005 Act are public inquiries into events that have caused or have potential to cause public concern, examples include inquiries into a particular event (e.g. the Dunblane inquiry 1996) or a series of events (e.g. the BSE inquiry 1997). They are held at the instigation of UK or Scottish Government Ministers with the aim of helping to restore public confidence in systems or services by investigating the facts, which may include why matters may have been dealt with in a particular way over the course of many years and making recommendations to prevent recurrence, not to establish liability or to punish anyone. By comparison, FAIs provide a local inquiry into the circumstances of a death and consider what steps might be taken to prevent deaths in similar circumstances.

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

52. Subsection (5) also gives the Lord Advocate a discretion not to hold an inquiry into the death of a person where the death is caused by industrial disease or exposure to substances hazardous to health and the Lord Advocate is satisfied that the method and circumstances of exposure to the disease or substance hazardous to health is well known within the industry within which the exposure took place and that that no further lessons can be drawn from the death which might be the subject of recommendations by the sheriff under section 22.

53. This means that the Lord Advocate is not required to hold an inquiry into every death caused by industrial disease or exposure to substances hazardous to health where the risks and circumstances of such exposure are well known in the relevant industry.
These documents relate to the Inquiries into Deaths (Scotland) Bill (SP Bill 71) as introduced in the Scottish Parliament on 1 June 2015

Notification where exceptions apply

Section 10 - Notification to relevant persons where exceptions apply

54. This section requires the Lord Advocate to notify the relevant persons as to whether it is intended to apply to hold an inquiry under section 8 when the criminal and inquiry proceedings mentioned in section 9(3) have been concluded.

55. Although section 7 requires the Lord Advocate to notify those persons if it is intended to apply for such an inquiry, it is extremely unlikely that the Lord Advocate would be in a position to do so where such proceedings have been started. This is because it is extremely unlikely that they would have been finished within the time limit of six months when such notification has to be given under that section.

56. Subsection (1) requires such notification to be given as soon as reasonably practicable and no more than three months after those proceedings have been concluded. The notification must be in writing and give reasons (subsection (2)).

57. The relevant persons must be notified whether the Lord Advocate is satisfied of the matters mentioned in section 9(2) or only partially satisfied as to those matters and in all cases whether it is intended to apply to hold an FAI and, if so, when.

58. Where the Lord Advocate is only partially satisfied about the matters in section 9(2), subsection (3) provides that, at the preliminary hearing under section 15, the Lord Advocate must narrate what those matters are. The sheriff may take account of such matters when determining the issues to be determined at the inquiry.

59. Subsection (5) defines when criminal or inquiry proceedings are concluded. This is required for the purposes of determining the 3 month time limit in subsection (1).

Time limit for applying for an inquiry

Section 11 - Time limit for applying for an inquiry

60. This section is new but it gives effect to the recommendation in paragraphs 6.22 and 10.18 of the Cullen Report that an application for an inquiry should be made at an early stage after the death of a person.

61. This section and sections 12 and 13 make provision where the Lord Advocate is required to apply to hold an inquiry under section 8. This section makes provision for the time within which the Lord Advocate is required to apply for such an inquiry.

62. Subsection (2) provides that the Lord Advocate is required to do so within three months after notifying the relevant persons of the intention to apply for the holding of an inquiry.

63. Subsections (3) and (4) provide that, if this is not possible, the Lord Advocate must determine a later date, which has to be as soon as practicable thereafter, and notify the relevant
persons and give reasons as to why it was not possible to apply to hold the inquiry at any earlier date.

**Application to hold an inquiry**

**Section 12 - Application to hold an inquiry: general provisions**

64. This section re-enacts sections 1(3) and 3(3) of the 1976 Act with amendments to give effect to paragraphs 4.35 and 10.9 of the Cullen Report and other amendments. It makes general provisions concerning the application to hold an inquiry.

65. Subsection (1) makes provision as to where the Lord Advocate is to apply for the holding of an inquiry. This is to the sheriff principal of the sheriffdom which appears to be most closely connected with the death or in such other sheriffdom as appears to the Lord Advocate to be appropriate. This provision is subject to section 13.

66. Subsection (2) requires the application to narrate briefly the circumstances of the death so far as known to the Lord Advocate.

67. Subsection (3) makes provision for multiple deaths. It provides that, if more than one death has occurred as a result of the same or similar circumstances as mentioned in any of the sections 2 to 4, the application may relate to all such deaths. Subsection (4) makes a consequential provision adapting reference to a death in the Act.

68. Subsection (5) requires a copy of the application to be sent to the relevant persons

**Section 13 - Application to hold an inquiry into a work related death**

69. This section is new. It makes provision as to where the Lord Advocate is required to apply for the holding of an inquiry into a work related death under section 2.

70. It applies when the Lord President of the Court of Session has provided for specialised sheriffs dealing with personal injury cases and an order has been made under section 41 of the Courts Reform (Scotland) Act 2014 providing for an all-Scotland personal injury court.

71. Subsection (3) provides that, in such a case, the Lord Advocate is required to apply for the holding of an inquiry by either such a specialised sheriff or by the all-Scotland personal injury court.

72. Subsection (4) provides that the Lord Advocate must apply for the holding of an inquiry by the all-Scotland personal injury court in two kinds of cases and may do so in other cases. The first case where the Lord Advocate is required to do so is where it appears to the Lord Advocate that the significance and importance of the inquiry in the public interest merit the inquiry being held in that court. The second case is where the partner of the deceased requests that the inquiry be held in that court and there is no special cause for the inquiry not to be held in that court.
PART 3: HOLDING OF AN INQUIRY

Participants at the inquiry

Section 14 - Persons who may participate in the inquiry

73. Subsection (1) makes provision as to who is entitled to participate in the inquiry proceedings. They are the Lord Advocate, the relevant persons and any other person who, in the view of the sheriff, has an interest in the inquiry. This would include any person to whom a recommendation may be addressed under section 22.

74. Subsection (2) defines what is meant by inquiry proceedings and references to a participant in the inquiry.

Preliminary hearing

Section 15 - Preliminary hearing

75. This section re-enacts section 3 of the 1976 Act but makes provision for a preliminary hearing, as recommended in paragraphs 6.29 to 6.32 and 10.19 to 10.22 of the Cullen Report, but with further amendments.

76. Subsection (1) requires the sheriff to make an order appointing a time, date and place for the holding of a preliminary hearing in connection with the inquiry.

77. Subsection (2) requires the date for the preliminary hearing to be as soon as reasonably practicable and no later than three months after the application for an inquiry was made to the sheriff.

78. Subsection (3) provides that, so far as may be reasonable practicable, the preliminary hearing and the rest of the inquiry is to be held in premises which are not a courtroom and which are in a locality which is closely connected with the circumstances of the death. This also gives effect to the recommendations of paragraphs 3.13 and 10.1 of the Cullen Report.

79. Subsection (4) requires the Lord Advocate to give notice to the participants in the inquiry, and to give public notice, of the holding of the preliminary hearing and the time and place fixed for it.

80. Subsection (5) requires the sheriff at the preliminary hearing, after hearing any representations and submissions from the participants in the inquiry, to determine any preliminary issues, such as those mentioned in subsection (6).

81. Subsection (6) specifies a number of preliminary issues to be determined. These include the issues to be addressed at the inquiry, the procedure and timetable to be followed, the evidence to be disclosed or recovered and any question of remitting the inquiry to another court.
The inquiry

Section - 16 Powers of the sheriff

82. Section 16 makes it clear that sheriffs have all of the inherent powers that they have as a judge in civil proceedings in relation to an FAI. This does not make an FAI a form of civil proceedings. Such inherent powers are, however, by virtue of subsection (2), subject to the other provisions in the Bill or provision made by act of sederunt under section 34.

Section – 17 Evidence and witnesses

83. Section 17 provides that the Lord Advocate must bring forward evidence relating to the circumstances of the death at the inquiry and that participants may also bring forward such evidence. The Bill does not regulate the procedure to be followed or the way in which evidence is led and further details on that may be provided in rules made by act of sederunt under section 34.

84. In addition, subsection (2) enables the sheriff to instruct the Lord Advocate or a participant in the FAI to lead evidence on any matter relating to the circumstances of the death. The sheriff is not, therefore, dependent upon the Lord Advocate nor the participants with regard to what evidence is led. An FAI is an inquisitorial judicial inquiry held in the public interest and empowering the sheriff in this way is in keeping with the aims of the process.

85. Subsections (3) and (4) continue this theme by providing that the sheriff may order a person to attend to give evidence or to produce documents or other things. This can be done either on the sheriff’s own initiative or on the application of the Lord Advocate or other participant in the FAI. Under subsection (9), failure to comply with such an order is an offence and subsection (10) provides for penalties.

86. Subsection (5) applies the rules of evidence that apply in civil proceedings to FAIs. This continues the approach in section 4(7) of the 1976 Act and, accordingly, evidence that has not been corroborated and hearsay evidence are both admissible in FAI proceedings (as set out in sections 1, 2, and 9(c) of the Civil Evidence (Scotland) Act 1988). It follows that the evidential standard for facts to be proven for FAIs is the civil standard of proof – the balance of probabilities. This is subject to rules made by act of sederunt under section 34.

87. Subsections (7) and (8) restate section 5 of the 1976 Act. These subsections make clear that, where a witness is questioned, that does not mean that subsequent criminal proceedings may not then be taken against that person. Further, if a question is put to a witness the answer to which could show the witness was guilty of an offence, that witness is not required to answer that question.

88. Subsections (11) to (13) make provision for offences relating to interfering, in various ways with the evidence to be taken into account at the FAI. Subsection (11) provides that a person commits an offence if, in the course of the FAI, that person does anything which is intended to have the effect of distorting or altering any evidence or document which is given or produced at the FAI or preventing any such evidence or documents from being given or produced. Subsection (12) provides that a person commits an offence if that person intentionally...
supresses, conceals, destroys or alters any document which the sheriff would have liked to have produced. Subsection (13) provides for penalties for anyone convicted of any such offence.

**Section 18 - Inquiry to be conducted in public**

89. Section 18 provides that an FAI should normally be open to the public. However, subsection (2) allows the sheriff to order that an inquiry, or part of it, is to be held in private.

90. Subsection (2) also provides that such an order may prohibit the identification of any specified person who is a participant in, or a witness at, the FAI. The order may also prohibit the publication of any information relating to the specified part of the inquiry which is to be held in private or the specified person.

91. Such an order may be made on the sheriff’s own initiative or on the application of the Lord Advocate or other participant in the FAI (subsection (3)).

92. Subsection (4) provides that any person who fails to comply with such order commits an offence and subsection (5) provides for penalties.

**Section 19 - Appointment of an assessor**

93. Under section 19, the sheriff can appoint an assessor to provide assistance to the sheriff in relation to that FAI based on the assessor’s specialist knowledge or expertise.

**Section 20 - Criminal proceedings and the adjournment of the inquiry**

94. This section is new. It makes provision as to what happens to an inquiry if criminal proceedings are taken against any person in respect of the death or any accident or any of the other circumstances mentioned in sections 2 to 4.

95. Subsection (1) provides that the fact that such criminal proceedings may be taken does not, by itself, mean that the inquiry cannot be commenced.

96. Subsection (2) makes provision as to what happens if the Lord Advocate requests the sheriff to adjourn the inquiry until after the conclusion of the criminal proceedings. It requires the sheriff to consider whether, and to what extent, the inquiry can effectively continue without causing prejudice to those proceedings. It is only to the extent that the sheriff considers that the inquiry cannot continue that the sheriff is required to adjourn the inquiry.

97. Subsection (3) makes provision as to what happens to the adjourned inquiry after the conclusion of criminal proceedings. It requires the sheriff to resume the inquiry unless the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established in the course of such criminal proceedings and that no further lessons can be drawn from the death.

98. Subsection (4) makes provision where the Lord Advocate is only partially satisfied of the matters mentioned in subsection (3). It requires the sheriff to resume the inquiry and provides
that the sheriff may take into account the matters about which the Lord Advocate is satisfied when determining the issues to be addressed at the resumed inquiry.

99. Subsection (5) requires the Lord Advocate to give reasons as to why the Lord Advocate is satisfied or partially satisfied of the matters mentioned in subsection (3).

PART 4: SHERIFF’S DETERMINATION AND RECOMMENDATIONS

Sheriff’s determination

Section 21 - Sheriff’s determination

100. The sheriff’s determination sets out what are the circumstances of the death which the sheriff has found to have been established on the evidence.

101. As section 1(2) makes clear, the circumstances of the death consist partly of the facts relating to the death, such as when and where the death occurred and what caused the death. These matters are covered in section 21(1)(a), (b) and (e).

102. However, they also include the findings as what are the lessons or precautions which can be drawn from that death as to what action requires to be taken, or not to be taken, in order to prevent further deaths in similar circumstances in the future. Those findings form the basis of the recommendations to be made by the sheriff under section 22. These matters are covered in section 21(1)(c) and (d).

103. This section re-enacts section 6(1) to (3) of the 1976 Act. Paragraph 10.29 of the Cullen Report recommended that section 6(1)(c) of the 1976 Act should be clarified to make it clear that, in determining what are the reasonable precautions which might have been taken which would have avoided the death, the sheriff should take hindsight into account. This is provided for in section 21(1)(c).

104. Subsection (2) re-enacts section 6(2) of the 1976 Act and makes it clear that the sheriff is entitled to be satisfied that any of those circumstances have been established even if the evidence is not corroborated.

105. Subsection (3) re-enacts section 6(3) of the 1976 Act and provides that an FAI determination is inadmissible in evidence and cannot be founded on in other judicial proceedings. This is an essential element of the distinction between, on the one hand, the fact-finding inquisitorial nature of the FAI with the sheriff empowered to make recommendations and on the other, the fault-finding, adversarial nature of civil proceedings. It is not the purpose of the FAI to establish liability. If liability arises from the death, then a civil case is the forum in which such matters are to be examined.
Sheriff’s recommendations

Section 22 - Sheriff’s recommendations

106. This section re-enacts section 6(3) of the 1976 Act but with amendments.

107. It empowers the sheriff, in the light of circumstances which have been found established in the determination under section 21, to make recommendations where the sheriff is satisfied that there are lessons that can be drawn from that death as to what action requires to be taken, or not to be taken, in order to prevent further deaths in similar circumstances in the future.

108. Subsection (3) provides that a recommendation may be made to any participant in the inquiry and any other person who appears to the sheriff to be concerned with safety and to have an interest in the lessons which might be drawn from the death.

109. Subsection (4) makes provision about the sheriff giving advance notice and an opportunity of being heard to any person to whom a recommendation might be addressed. It provides that, before making any recommendation to such a person, the sheriff is required to send to that person a copy of the determination or proposed determination under section 21 and of the proposed recommendation and to give that person an opportunity of being heard or represented or of submitting a written statement. The sheriff is required to consider any such representations before making the recommendation.

Warning notices

Section 23 - Warning notices

110. This section is new. It makes provision for the sheriff, before making any determination under section 21 or recommendation under section 22, to give warning notices to any person who the sheriff considers has been or might be criticised, either expressly or by implication, from the proceedings of the inquiry or that such criticism might be inferred from the evidence given or from the determination or recommendation. This provision is in addition to the advance notice of any determination under section 22(4).

111. Subsection (2) makes provision as to what the warning notice has to contain. This includes a statement of what the criticism or proposed criticism might be, of the facts which might support such criticism and of any evidence or documents which might support those facts. The notice also has to give the person an opportunity to make a written statement and to make it clear that the information is subject to confidentiality.

112. The sheriff may send copies of any relevant evidence or documents if it is considered appropriate to do so (subsection (3)). But subsection (4) provides that this provision does not apply in the case where the criticism might be inferred from the evidence or documents but the warning notice must refer to that evidence or documents.
Conclusion of the inquiry

Section 24 - Conclusion of the inquiry

113. This section re-enacts section 6(4) and (5) of the 1976 Act, with some amendments.

114. It makes provision as to what happens at the conclusion of the FAI.

115. Subsection (1) provides that the Scottish Courts and Tribunals Service (“the SCTS”) is to send a copy of the determination and any recommendations to the Lord Advocate, any other participant in the inquiry and any other person to whom a recommendation is addressed.

116. The SCTS is also required, when requested to do so by the Lord Advocate, to send various documents relating to the inquiry to any relevant Minister of the Crown in the UK Government, the Scottish Ministers and the Health and Safety Executive.

117. The Lord Advocate is also required to send to the Registrar General of Births, Deaths and Marriages for Scotland the name and last known address of the person who has died and the date, place and cause of that person’s death.

118. Subsection (3) enables any person, upon payment of the fee prescribed by act of sederunt under section 34, to obtain from the SCTS a copy of the transcript of evidence at the inquiry and any determination and recommendation

Enforcement of any recommendation

Section 25 - Enforcement of any recommendation

119. This section is new. It makes provision for the enforcement of the recommendations made by the sheriff under section 22. The provisions in relation to enforcement are restricted by subsection (5) because of the provisions of the Scotland Act 1998 in relation to reserved matters.

120. Subsection (1) requires the person to whom the recommendation is addressed, within the time specified by the sheriff or by the Sheriff Appeal Court, to comply with that recommendation and to notify the sheriff, the Lord Advocate and other participants in the inquiry, of various matters. The time specified may not be before the time limits for lodging an appeal as set out in sections 26 and 29.

121. The matters are whether the recommendation has been fully implemented or that it has not been fully implemented and, if so, the reasons why it has not been and the steps, if any, which have been taken to do so and the time within which it is expected that the recommendation will be fully implemented.

122. Where that person fails to notify the sheriff and the others as required by subsection (1)(b), subsection (3) requires the Lord Advocate to report that failure to the sheriff and to send a copy of that report to the person concerned and to any other participants in the inquiry. The
sheriff may make an order requiring that person to appear at a hearing. However, subsection (3) does not apply if there has been an appeal until the appeal is concluded.

123. Subsection (4) applies in any case where the person to whom the recommendation is addressed notifies the sheriff that the recommendation has not been fully implemented. The sheriff is then empowered, after hearing representations from that person and any other party to the inquiry, to make an order requiring that person to implement the recommendation in full within such time as is specified in the order.

124. Subsection (5) provides that subsection (4) does not apply to any recommendation which relates to a reserved matter within the meaning of the Scotland Act 1998 or is addressed to a reserved body within the meaning of the Act. Subsection (4) also does not apply to recommendations relating to functions exercised otherwise than in or as regards Scotland.

125. Subsection (6) provides that any person commits an offence if that person, without reasonable excuse, fails to do what is required by an order of the sheriff under subsection (4). Subsection (7) provides for the penalty.

PART 5: APPEALS

Appeals to the Sheriff Appeal Court

Section 26 - Appeal from a sheriff to the Sheriff Appeal Court

126. This section and the subsequent four sections of the Bill set out the framework for persons to whom a recommendation is addressed by the sheriff under section 22 to appeal against that recommendation and the effect of such an appeal.

127. This provides that such a person may appeal to the Sheriff Appeal Court with the permission of the sheriff or, if the sheriff has refused permission, with the permission of the Sheriff Appeal Court. Subsections (2), (3) and (4) contain provisions as to the time limits for taking an appeal which are self-explanatory.

128. Subsection (5) makes it clear that any appeal against a recommendation may include an appeal against the recommendation being addressed to the appellant.

129. Subsection (6) provides that in any appeal the Sheriff Appeal Court may allow further evidence.

Section 27 - Sheriff Appeal Court’s powers of disposal in appeals

130. Section 27 sets out the powers of the Sheriff Appeal Court to dispose of an appeal under section 26.

131. This section provides that, as the court thinks fit, the Sheriff Appeal Court may dispose of the appeal in whole or in part by—
These documents relate to the Inquiries into Deaths (Scotland) Bill (SP Bill 71) as introduced in the Scottish Parliament on 1 June 2015

- adhering to a recommendation which is the subject of the appeal,
- recalling the recommendation or recalling the recommendation being addressed by the appellant,
- varying the recommendation,
- remitting the case back to the sheriff, or
- dismissing the appeal.

132. This section also provides that the Sheriff Appeal Court may make such incidental or interim order as is necessary; and may determine any incidental or other issue that needs to be determined for the purpose of doing justice at the appeal.

Section 28 - Remit of appeal from the Sheriff Appeal Court to the Court of Session

133. This section provides that the Sheriff Appeal Court may remit the appeal to the Court of Session.

134. Subsection (2) provides that the Sheriff Appeal Court may remit the appeal to the Court of Session:
- on the application of the party to the appeal, and
- it is satisfied that the appeal raises a complex or novel point of law.

135. Subsection (3) sets out the power of the Court of Session to dispose of an appeal remitted to it under subsection (2). It provides that the Court of Session may deal with and dispose of the appeal as if it had originally been made to that Court.

Appeals to the Court of Session

Section 29 - Appeal from the Sheriff Appeal Court to the Court of Session

136. This section provides that a decision of the Sheriff Appeal Court may be appealed to the Court of Session but only—
- with the permission of the Sheriff Appeal Court, or
- with the permission of the Court of Session, where the Sheriff Appeal Court has refused permission.

137. Subsections (2), (3) and (4) contain provisions for the time limits for making an appeal.

138. Subsection (5) provides that permission may only be granted to appeal to the Court of Session where:
- the appeal raises an important point of principle or practice, or
- there is some other compelling reason for the Court of Session to hear the appeal.
Section 30 - Appeals: granting of leave or permission and assessment of grounds of appeal

139. This section provides that, where an application is made to the Court of Session for permission to appeal against a decision of the Sheriff Appeal Court, a single judge of the Inner House of the Court of Session may determine leave or permission and assess the grounds of appeal.

Effect of appeal

Section - 31 Effect of appeal

140. This section provides for the effect of an appeal.

141. Subsection (1) provides that it applies to an appeal to the Sheriff Appeal Court under section 26 (including such an appeal remitted to the Court of Session under section 28) and an appeal to the Court of Session under section 29.

142. Subsection (2) provides that, in the appeal, all of the decisions pronounced in the original proceedings are open to appeal.

143. Subsection (3) provides that any party to the original proceedings may insist in the appeal even though the party was not the one who initiated the appeal.

144. Subsection (4) defines the term “original proceedings”.

PART 6: GENERAL

Re-opening of the inquiry

Section 32 - Re-opening of the inquiry

145. This section is new. It gives effect to paragraphs 9.8, 9.9, 10.35 and 10.36 of the Cullen Report, with amendments.

146. This section provides that, after the conclusion of the inquiry, the Lord Advocate may apply to the sheriff for the inquiry to be re-opened where the Lord Advocate is satisfied that new evidence exists, or may exist, which was not reasonably available at the time of the inquiry and which would have been likely to affect the determination or any of the recommendations made by the sheriff under sections 21 and 22. The Lord Advocate also has to be satisfied that it is in the public interest that the new evidence should be considered at any re-opened inquiry.

147. Subsection (2) provides that the application should be made to the sheriff who held the original inquiry with reasons as to why the inquiry should be re-opened. A copy of the application is to be sent to the parties to the inquiry and any person to whom any of the recommendations under section 22 has been addressed.
148. Subsection (3) makes provision where the sheriff who held the original inquiry is unavailable. In this case, the Lord Advocate is to apply to the sheriff under section 12 or 13 whichever applied to the original inquiry.

149. Subsection (4) provides that the sheriff is to make an order appointing a time, date and place to consider whether the inquiry should be re-opened and, if so, the hearing of the new evidence. Subsection (5) requires the Lord Advocate to give notice of that order to the participants in the inquiry and any person to whom any of the recommendations under section 22 has been addressed and to the public.

150. Subsection (6) provides that, after hearing submissions and representations, the sheriff must decide whether to re-open the inquiry or to order a new inquiry to be held.

151. Subsection (7) provides that, if the sheriff decides that it would be more appropriate to have a new inquiry, the sheriff must order the Lord Advocate to apply to a sheriff, under section 12 or 13, for a new inquiry to be held.

152. Subsection (8) provides that, if the sheriff decides to re-open the inquiry, the sheriff must hear the new evidence and, after considering any submissions and representations made by the persons referred to in subsection (6), may confirm, delete or amend the determination and any recommendations made under section 21 or 22.

153. Subsection (9) provides that the provisions of this Bill, and of an act of sederunt made under section 34, apply to the re-opened inquiry or, as the case may be, any new inquiry, as they apply to the inquiry when originally held.

**Offences by bodies corporate etc.**

**Section 33 - Offences by bodies corporate etc.**

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

**Inquiry procedure rules**

**Section 34 - Power to regulate procedure etc.**

155. This section gives the Court of Session a broad power to make acts of sederunt concerning the procedure and practice to be followed in the inquiry proceedings.

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

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

**General**

**Section - 35 Repeal of enactments**

158. Subsection (1) repeals the 1976 Act in consequence of its re-enactment in the form of the Bill.

159. For the most part, the 1976 Act only extends to Scots law. However, section 4(4) and (5), which are not replaced, extend to the law of England and Wales and Northern Ireland. It will be necessary for an Order in Council to be made under section 104 of the Scotland Act 1998 to extend such repeals to those jurisdictions.

160. Subsection (2) introduces schedule 2 which is more fully described below. Insofar as any of the repeals modifies the law on reserved matters, this is in the context of repealing provisions which are spent as a consequence of restatement in the Bill.

**Section - 36 Ancillary provision**

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

162. Subsection (2) provides that such regulations may modify any enactment (including the Bill) but if they make textual amendments they are subject to the affirmative procedure. Otherwise the regulations are subject to the negative procedure.

**Section 37 - Interpretation**

163. This section defines expressions for the purposes of the Bill.

164. Subsection (2) has an index of expressions defined elsewhere in various provisions of the Bill. It provides that such expressions are to have the same meaning in this Bill as they have in the specified provisions.
Section 38 - Application of this Act

165. This section makes provision in relation to the deaths to which the Bill apply in respect of the date of death. In particular, the section provides that the Bill applies to deaths after the coming into force of Part 1 of the Bill.

Section 39 - Commencement

166. This section makes provision for commencement. Sections 34, 36 and 38 and this section come into force on the day after Royal Assent and the remaining provisions come into force on such day as the Scottish Ministers may determine by regulation.

Section 40 - Short title

167. This section provides that the short title is the Inquiries into Deaths (Scotland) Act 2015.

SCHEDULE 1: PROCEDURE RULES

Role of the Scottish Civil Justice Council

168. Paragraph 1 of schedule 1 amends the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013, bringing the practice and procedure of the inquiries under the Bill and the making of rules by act of sederunt under section 34 for such inquiries under the ambit of the Scottish Civil Justice Council.

Transitional arrangements

169. Paragraph 2 of schedule 1 sets out the transitional arrangement affecting section 34. It will initially be the role of the Scottish Ministers, by regulations, to make rules for such inquiries until such time as the provisions conferring responsibility on the Scottish Civil Justice Council and the Court of Session for the making of such inquiry rules are commenced.

170. It is made clear that section 34(4), which requires consultation with the Scottish Civil Justice Council prior to the making of rules, will not apply during this transitional period. However, the Scottish Ministers must instead consult the Lord President and such other persons as are considered appropriate before making any such regulations.

SCHEDULE 2: REPEAL OF ENACTMENTS

171. Schedule 2 repeals certain provisions in the Acts of Parliament referred to in section 9(3)(b)(c) and (e). The provisions being repealed have the same effect as section 9.

172. This also effects a restatement of reserved law. The provisions repealed in Scots law extend to the law of England and Wales and, except in the case of the Gas Act 1965, extend to Northern Ireland. It will be necessary for an Order in Council to be made under section 104 of the Scotland Act 1998 to extend such repeals to those jurisdictions.
FINANCIAL MEMORANDUM

INTRODUCTION

1. This document relates to the Inquiries into Deaths (Scotland) Bill introduced in the Scottish Parliament on 1 June 2015. It has been prepared by Patricia Ferguson MSP, who is the member in charge of the Bill, to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

2. The Policy Memorandum, which is published separately, explains in detail the background to the Bill and the policy intention behind the Bill. The purpose of this Financial Memorandum is to set out the costs associated with the measures introduced by the Bill, and as such it should be read in conjunction with the Bill and the other accompanying documents.

3. The Bill will repeal and re-enact the Fatal Accidents and Sudden Deaths (Scotland) Act 1976 (“the 1976 Act”) but with amendments to give effect to many of the recommendations made in the Report on the Review of the Fatal Accident Inquiry (FAI) Legislation by Lord Cullen in 2009 (the Cullen Report) and other amendments which go beyond Lord Cullen’s recommendations.

4. Patricia Ferguson MSP carried out a public consultation on the proposals to implement Lord Cullen’s recommendations and other measures to modernise the FAI system. This ran from 2 August 2013 to 31 January 2014. The consultation provided organisations and individuals the opportunity to comment on the potential impacts of the proposals. There were 30 responses from this consultation period and it was clear that the majority of responses to the proposal were supportive.

5. The consultation results showed that the bodies responsible for the investigation of sudden deaths, along with those representing insurance companies and employers, tended to oppose to proposed Bill or to parts of the Bill. Responses from major trade union organisations and advocacy groups on the other hand demonstrated the highest levels of support. The consultation also showed that some of the responses which opposed various specifics of the proposal also expressed support for the general aims and other aspects of the Bill.

6. Much of the information, including estimates of the costs and impacts, contained in this Financial Memorandum is based upon that contained in the Financial Memorandum which accompanied the Bill (“the Government’s Bill”) which the Scottish Government introduced into the Scottish Parliament on 19 March 2015. The Government’s Bill also proposes to repeal and re-enact the 1976 Act and make amendments to implement some of the recommendation in the Cullen Report but the amendments made in this Bill go further. This Memorandum gives an overview of the impact on the Scottish Government, Crown Office and Procurator Fiscal Service.

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2 Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (SP Bill 63)
These documents relate to the Inquiries into Deaths (Scotland) Bill (SP Bill 71) as introduced in the Scottish Parliament on 1 June 2015

(COPFS), Scottish Courts and Tribunal Service (SCTS), and the other affected bodies as a result of the provisions in the Bill.

7. The Government’s Financial Memorandum states that the estimates of costs and impacts contained in that Memorandum were compiled from information provided by the bodies affected by the Bill, such as COPFS, SCTS. The figures provided are the best estimates available. However, many of the provisions will have no impact or financial element as they are a restatement of the current provisions.

OVERVIEW OF EXISTING POSITION

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

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

9. Table 2 gives an overview of the average costs of three different lengths of FAIs. Obviously it is impossible to predict the number and length of FAIs in any given year and any additional FAIs provided for by this Bill will fall into one of these categories depending on the case itself.

<table>
<thead>
<tr>
<th></th>
<th>1 day FAI</th>
<th>1 week FAI</th>
<th>Lengthy FAI</th>
</tr>
</thead>
<tbody>
<tr>
<td>COPFS*</td>
<td>£9,494</td>
<td>£13,122</td>
<td>£94,701</td>
</tr>
<tr>
<td>SCTS*</td>
<td>£2,000</td>
<td>£10,000</td>
<td>£90,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£11,494</strong></td>
<td><strong>£23,122</strong></td>
<td><strong>£184,701</strong></td>
</tr>
</tbody>
</table>

10. The one-day FAI is based on a straightforward mandatory FAI into a death in custody heard over one day or less. The one-week FAI is based on a week-long mandatory FAI into a death as a result of a work-place accident. The lengthy FAI is based on a discretionary FAI involving complex medical evidence (the length of 45 days has been used for the SCTS cost as

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* Figures as at 31/1/15
* Includes administrative, precognition, Victim Information & Advice (VIA), legal, pathology and witness costs
* Based on the basic approximate cost of an FAI sitting in a sheriff court, which includes judicial and staff costs as well as running costs.
These documents relate to the Inquiries into Deaths (Scotland) Bill (SP Bill 71) as introduced in the Scottish Parliament on 1 June 2015

an example). The impact on SCTS relates to the accommodation, services, staff and judiciary it provides for the purposes of FAIs.

11. The following assumptions were made in estimating the existing costs in Table 2. The costs for SCTS are based on the actual court sitting days for the hearing and, as such, do not include preparation work, including preliminary hearings. They also exclude any additional costs if the FAI is held out with a sheriff court room. The estimates for COPFS for the one-day FAI and the one-week FAI assume that administrative and legal staff costs were mid-range; the legal costs for COPFS for the lengthy FAI were, however, calculated at the equivalent of the Civil Service Grade 6 level (£53,060 - £64,733).

12. The figures in Tables 1 and 2 show that the numbers and costs of FAIs vary each year and depend on the nature and circumstances of the death. There were markedly fewer FAIs held in 2013/14 compared to other years.

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

<table>
<thead>
<tr>
<th>Table 3: COPFS expenditure and staff</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>-------------------------------------</td>
</tr>
<tr>
<td>Total expenditure in £000s</td>
</tr>
<tr>
<td>Death investigation expenditure in £000s</td>
</tr>
<tr>
<td>Total permanently employed staff</td>
</tr>
<tr>
<td>Staff employed on death investigations</td>
</tr>
</tbody>
</table>

BILL PROVISIONS: MAIN AMENDMENTS

14. In this Memorandum, an inquiry under the Bill is referred to as an FAI (Fatal Accident Inquiry) even although the Bill has the effect of not restricting such inquiries to cases where there has been a fatal accident.

15. The main amendments which the Bill makes to the existing system of FAIs are to—

- require the Lord Advocate, within 6 months after death or, if there are criminal or other inquiry proceedings into the death, within 3 months after their conclusion, to notify the relatives of the deceased as to whether or not there is to be a FAI and to give reasons for whatever decision is reached (sections 7 and 10),

- require the Lord Advocate, within 3 months after notifying the relatives that there is to be a FAI, to apply to the sheriff to hold an FAI (section 11),

- require the sheriff to hold a preliminary hearing within 3 months of such an application being made (section 15),

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6 Figures taken from COPFS annual reports and accounts, available at: [http://www.copfs.gov.uk/publications/finance](http://www.copfs.gov.uk/publications/finance). This expenditure is for the net operating costs only

7 The average number of whole-time equivalent persons employed permanently on death investigations.
extend the range of work related deaths in relation to which a FAI is mandatory to include deaths which have resulted from industrial disease or exposure of substances hazardous to health due to the person’s employment or occupation (section 2(1)(b)). However, in such a case, the Bill also provides that an FAI need not be held if the circumstances of the exposure are well known within the industry and there are no further lessons to be learnt from the death (section 9(5)),

extend the range of deaths in legal custody where a FAI is mandatory to include the death of a person who, at the time of death, was—

- in police custody (section 3(2)),
- subject to compulsory detention by a public authority within the meaning of section 6 of the Human Rights Act 1998 (c.42) which is defined to include various cases where the court orders a person to be detained in a hospital, whether for reasons of mental illness or public health (section 3(1)(b) and (3),
- subject to a compulsory treatment order, or an interim compulsory treatment order, whether detained in a mental hospital or not (section 3(1)(c)),
- a voluntary patient in a hospital for treatment of mental disorder (section 3(1)(d)),
- a child required to be kept or detained in secure accommodation (section 3(1)(e)),

permit FAIs at the discretion of the Lord Advocate into deaths of Scots abroad where the body is repatriated (section 5),

provide for FAI to be held where, after criminal or other inquiry proceedings are concluded, the Lord Advocate is satisfied that the circumstances of the death are known but is not satisfied there are no further lessons to be drawn from the death as to how to avoid similar accidents in the future (section 9(2)),

require the Lord Advocate, in the case of a mandatory FAI into a work related death, to apply for the holding of an FAI by a specialist sheriff in personal injury cases or the specialist personal injury court, if such a sheriff or court is designated as such under the Courts Reform (Scotland) Act 2014,

provide for the enforcement of any recommendations made by the sheriff by a court order, which, if not complied with, can lead to criminal prosecution (section 25),

provide for the sheriff to give advance notice and a warning notice to any person to whom a recommendation is addressed (section 22(4) and 23) and to provide for an appeal by that person to the Sheriff Appeal Court and to the Court of Session against that recommendation (sections 26-31),

provide for the inquiry to be re-opened in the event of new evidence (section 32), and

provide for practice rules to be made by act of sederunt by the Court of Session which may include provision for financial provision to be given to relatives to enable them to be legally represented (section 34 (2)(j)). The Rules will be made by the Scottish Ministers as a transitional arrangement before the rule-making power is
These documents relate to the Inquiries into Deaths (Scotland) Bill (SP Bill 71) as introduced in the Scottish Parliament on 1 June 2015

conferring on the Court of Session, advised by the Scottish Civil Justice Council (SCJC) (Schedule 1).

OVERVIEW OF COSTS

COSTS ON THE SCOTTISH ADMINISTRATION

16. The Bill’s provisions are not expected to have significant cost implications for the Scottish Government. The only provisions which directly impact upon Scottish Ministers is to make the new FAI rules required as a transitional arrangement before the rule-making power is conferred on the Court of Session, advised by the Scottish Civil Justice Council (SCJC). These rules are required as part of the reform of the FAI system.

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

COSTS ON LOCAL AUTHORITIES

18. Extending the mandatory categories of FAI to include deaths of children in secure accommodation will be of interest to local authorities as they provide secure accommodation. However, there are not expected to be additional costs to local authorities as a result of this measure because an increase in the number of FAIs as a result of this provision is unlikely.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

19. In general, it is not anticipated that there will be significant cost implications on bodies, individuals or businesses. However, the proposals for enforcing the recommendations of the sheriff, by criminal sanction if necessary, may lead to increased costs on those bodies or businesses to whom the recommendations are addressed, depending upon what the recommendation requires them to do or not to do.

Scottish Legal Aid Board

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

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

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

Table 4: Legal assistance for FAIs

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

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

Other public funding

24. The Bill enables the Scottish Government to extend and increase funding available to families to enable them to obtain legal representation at FAIs. Provision for this may be included

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

9 This excludes any nil payments for legal aid certificates. This is not the average cost of an FAI case as there could be multiple certificates for one FAI. An example is the Rosepark FAI which resulted in a total of £2.1 million paid across 6 parties.
as part of the FAI rules (section 34(2)(j)). This rules will be made initially by the Scottish Ministers and, thereafter, by the Court of Session with draft rules being provided by the SCJC. As a matter of policy, that is something Patricia Ferguson would like to see taken forward and in particular would like to see a funding model similar to funding available at public inquiries. However, that would be a matter for the FAI rules and it would be for the Scottish Government at that time to consider and prepare the relevant financial impact assessment.

**NHS Scotland**

25. Currently NHS Scotland is involved in FAIs when inquiries are held at the discretion of the Lord Advocate into deaths in hospitals or some other form of health care setting. Doctors, nurses and other healthcare workers often give evidence and “medical” inquiries can be among the most complex and long-running FAIs.

26. The provisions of the Bill will introduce the requirement of a mandatory FAI when there has been a death of a person subject to a compulsory hospital detention orders, compulsory treatment orders or interim compulsory treatment orders and of a voluntary patient in a hospital for treatment of mental disorder (section 3). However, it is thought that the number of such cases is likely to be small and, at present, they are likely to trigger a discretionary FAI. Accordingly, it is estimated that the number of additional FAIs resulting from the amendments made by the Bill will be no more than one or two per year.

27. There may be some administrative and legal costs incurred in complying with any recommendations addressed to NHS Scotland. However, the numbers of these are expected to be minimal as sheriffs only make recommendations in fewer than 20 FAIs per annum and few of these will relate to medical inquiries. In such cases, remedial action is likely to have been taken by the time the sheriff makes recommendations and a response will simply explain what action has been taken. NHS bodies will normally be represented at FAIs by their own legal representatives and the response to a recommendation addressed to such a body will be dealt with by those legal representatives.

28. Therefore, it is not thought that any additional cost as a result of this Bill is unlikely to be substantial.

**COST OF MAIN AMENDMENTS IN BILL**

1. **Extension of categories of mandatory FAIs**

   i. **Industrial disease or exposure to hazardous substances in the workplace**

   29. The Bill extends the range of work related deaths in relation to which a FAI is mandatory to include deaths which have resulted from industrial disease or exposure of substances hazardous to health due to the person’s employment or occupation (section 2(1)(b)).

   30. The Bill recognises that it is likely that deaths falling within this category will be in circumstances where the causes, dangers and circumstances of such diseases and exposures are already well established. The Bill, therefore, provides that an FAI need not be held if the Lord
Advocate is satisfied that those circumstances are well known within the industry and that there are no further lessons to be learnt from the death (section 9(5)).

31. It is not known how many deaths within this category are anticipated to take place in a year but, in view of the exception made in section 9(5), it is thought that there will not be more than one or two additional FAIs held every five years as a consequence of this amendment.

Cost on the Scottish Administration

32. As it is anticipated that there will be very few additional FAIs held as a result of this provision, it is thought that any additional cost to any part of the Scottish Administration is likely to be minimal. Any additional FAIs in any year will be managed by the natural flux of death investigations and FAIs.

Costs on local authorities, NHS and other persons and bodies,

33. As it is anticipated that there will be very few additional FAIs held as a result of this provision, it is thought that any additional cost to those persons and bodies, including employers and insurance companies, is also likely to be minimal.

ii. Deaths when under police arrest or detention

34. The Bill makes FAIs mandatory for deaths in all types of legal custody irrespective of the place of death.

35. It is not known how many deaths within this category are anticipated to take place in a year but it is not thought that there should be very many. In addition, it is not thought that there will be any additional FAIs held as a result of this amendment because the existing provisions relating to mandatory FAIs in the 1976 Act are interpreted to include such cases.

Costs on the Scottish Administration

36. It is not expected that this provision will increase the number of FAIs and is not, therefore, expected to give rise to extra costs to Police Scotland, COPFS or SCTS.

37. This is because it is understood that COPFS already interprets the term “detention” in section 1(4) of the Fatal Accidents and Sudden Deaths (Scotland) Act 1976 to cover any death during police arrest under the existing legislation.

Costs on other bodies, individuals and businesses

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

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

iii. Compulsory detention in hospitals

40. The Bill will extend the range of deaths in legal custody to include cases where persons have died while subject to compulsory detention by a public authority within the meaning of section 6 of the Human Rights Act 1998 (c.42). This is defined to include various cases where the court orders a person to be detained in a hospital, whether for reasons of mental illness or public health (section 3(1)(b) and (3)).

41. It is not known how many deaths in this category are likely to occur in any year, but it is not thought that there will be very many. However, it is envisaged that, in most, if not all, of those cases, they would have been subject to a discretionary FAI under the existing provisions of the 1976 Act. This is particularly so in the case of the death of any offender ordered to be detained in a hospital or any person detained for public health reasons.

42. It is, therefore, thought that making these cases into a mandatory category could result in no more than an additional one or two FAIs every two years.

iv. Compulsory medical treatment

43. The Bill provides that a FAI is mandatory in the case of the death of a person who, at the time of death, was subject to a compulsory treatment order, or an interim compulsory treatment order, whether detained in a mental hospital or not (section 2)(1)(c)).

44. It is not known how many deaths in this category are likely to occur in any year but it is not thought that there will be very many. In the case where the patient is already subject to a compulsory detention order, the death of such a patient would fall within the above category where it is likely that there might have been a discretionary FAI held under the 1976 Act. In the case where the patient is not so subject, the order authorising compulsory treatment may also authorise the patient to be detained in a hospital in which case it also thought likely that that there might have been a discretionary FAI held under the 1976 Act. Therefore, the only completely new cases are where the patients are subject to a compulsory treatment order but not detained in a hospital. It is simply not known how many of those patients die subject to such an order but the numbers must be very small.

45. It is, therefore, thought that having these cases as a mandatory category could result in, at most, no more than an additional one or two FAIs every two years.

v. Voluntary patients receiving treatment at a mental hospital

46. The Bill provides that a FAI is mandatory in the case of the death of a person who, at the time of death, was a voluntary patient receiving treatment at a hospital for mental disorder.
47. It is not known how many deaths in this category are likely to occur in any year but it is thought that there is likely to be a similar number as in the case of those receiving compulsory treatment.

vi. Deaths of children in secure accommodation

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

49. There has been no death of a child in secure accommodation in the last five years. An FAI would usually be held on a discretionary basis for any deaths of children in secure accommodation under the current legislation unless the bereaved relatives were strongly opposed.

50. It is, therefore, thought that having this as a mandatory category would result in no more than an additional one or two FAIs every few years.

Aggregate costs of the cases in iii.–vi.

51. Having regard to the above considerations, it is thought that the aggregate number of additional FAIs which are likely to be held in consequence of extending the category of mandatory FAIs to include those four additional cases would be no more than one or two per year.

Costs on the Scottish Administration

52. Given the estimate that there might only be one or two additional FAIs each year, it is not thought that any additional staff would be required. However, depending on the complexity and, therefore, the length of any inquiry, the expected average cost would be as set out in Table 2, that is around £23,000 per inquiry (e.g. £13,000 cost to COPFS and £10,000 cost to SCTS for a mid-length inquiry). This would make the estimated total cost around £23,000 or £46,000.

Costs on local authorities

53. Even if the proposal to have a mandatory FAI in the case of the death of a child in secure accommodation results in one additional FAI per year, which would be unlikely given the circumstances above, this could be managed from existing resources as part of duties regarding looked-after children. The local authorities that responded to the consultation agreed with this proposal and did not raise any resource concerns.

Costs on other bodies, individuals and businesses

54. In some of these cases there may be an additional claim on the Legal Aid Fund. Table 4 sets out the average and range of costs for Legal Aid and it would be assumed this would be the same for any FAIs of this type.
2. Investigations and inquiries into deaths abroad

55. Section 5 of the Bill deems three cases of deaths which occurred outwith Scotland to have occurred in Scotland for the purposes of the Bill. Section 5(2) and (6) re-enacts the effect of the existing law in relation to the deaths of persons as a result of accidents on certain parts of the continental shelf and of certain deaths of service personnel abroad.

56. Section 5(4) is new and provides in effect that the Lord Advocate may hold a discretionary FAI into the death abroad of a person ordinarily resident in Scotland whose body has been repatriated to Scotland.

57. Paragraphs 47-53 of the Financial Memorandum for the Government’s Bill indicated that it was not known how many bodies were repatriated to Scotland in any year and how many of those would require investigation to ascertain whether the death might fall within the scope of a discretionary inquiry as being sudden, suspicious or unexplained or occurred in circumstances giving rise to serious public concern (see section 4 of this Bill). However, it estimated that there might be around 200 bodies repatriated each year with only 50 requiring investigation but of those no more than one additional FAI to be held each year where the public interest criteria in section 4 would be met. These estimates were broadly in line with the number of FAIs held as a proportion of death investigations carried out by COPFS.

Costs on the Scottish Administration

58. It is understood from the Financial Memorandum to the Government’s Bill that it is not intended that COPFS or Police Scotland should travel to the country where the death took place to conduct investigations. It is also not expected that there would be any post-mortem carried out because the bodies are likely to be embalmed before being repatriated.

59. Any inquiry would, therefore, be based on documentary evidence. Documents, such as a death certificate and any post-mortem and toxicology report, should be provided with the body as part of repatriation. Paragraph 52 of that Memorandum indicates that COPFS expects that the FCO would seek documentation from the local competent legal authorities, including police reports and witness statements, and then provide this to the Lord Advocate for investigation. This will result in lower costs for COPFS directly and not significantly increase the costs to the FCO because it would already be providing consular support for the deaths of Scots abroad.

60. In paragraph 50 and Table 5 in the Financial Memorandum to the Government’s Bill, COPFS estimated the annual costs for investigating each repatriated deaths as follows-

<table>
<thead>
<tr>
<th>Table 5: estimated potential costs for investigating deaths abroad</th>
</tr>
</thead>
<tbody>
<tr>
<td>Translation costs</td>
</tr>
<tr>
<td>Staff costs - Liaison with nearest relatives and general correspondence</td>
</tr>
<tr>
<td>Staff costs – Liaison with authorities in foreign jurisdiction</td>
</tr>
<tr>
<td><strong>Total cost</strong></td>
</tr>
</tbody>
</table>
61. In arriving at this figure, COPFS made the following assumptions:
   - The documentation that will require to be translated will include any police report, post mortem and/or toxicology report and witness statements;
   - The number of witness statements will be the same as a current case involving an FAI of one week’s duration, namely 21 witness statements; and
   - The level of liaison and correspondence will equate to a current case involving an FAI of one week’s duration.

62. This means that, based upon COPFS’s estimate that there are likely to be no more than 50 investigations of deaths abroad each year, this means at a total cost of approximately £157,350.

63. COPFS has estimated that, based upon this level of investigations, there should be no more than one additional FAI held each year. Depending on the complexity and, therefore, the length of any inquiry, the expected average cost would be as set out in Table 2 (e.g. £13,000 cost to COPFS and £10,000 cost to SCTS for a mid-length inquiry).

Costs on other bodies, individuals and businesses

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

3. Putting families of the deceased at the heart of the process

65. The Bill makes various amendments which are intended to increase the involvement of the families in the FAI process, in particular by: removing delay in decisions being taken as to whether an FAI is to be held and, if so when; and keeping the families informed of what is happening and enabling the families to have a say at the preliminary hearing as to what issues are to be raised at the FAI. The Bill—
   - requires the Lord Advocate, within six months after death or, if there are criminal or other inquiry proceedings into the death, within three months after their conclusion, to notify the relatives of the deceased as to whether or not there is to be a FAI and to give reasons for whatever decision is reached (sections 7 and 10),
   - requires the Lord Advocate, within three months after notifying the relatives that there is to be a FAI, to apply to the sheriff to hold an FAI (section 11),
   - requires the sheriff to hold a preliminary hearing within three months of such an application being made (section 15) and requires the Lord Advocate to notify the family of the date of the inquiry (section 15(4)),
   - enables the family to act as participants at the preliminary hearing and can make submissions about the issues to be raised at the FAI( section 14),
   - enables the FAI rules to provide for funding to be made available to families to enable them to obtain legal representation at FAIs (section 34(2)(j)).
66. According to paragraph 29 of the Policy Memorandum which accompanied the Government’s Bill, COPFS has already implemented the recommendations in the Cullen Report which are intended to speed up the investigations into deaths, principally by the establishment of COPFS’ Scottish Fatalities Investigation Unit (SFIU).

67. According to that Memorandum, SFIU now has responsibility for overseeing the progress from the outset in all FAI cases and “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.” (paragraph 31).

68. It is not thought, therefore, that the amendments made in the Bill are requiring the Lord Advocate and the Lord Advocate’s departments to undertake additional duties over and above those which they do at present. They merely provide a statutory basis for what largely happens in practice in many areas, allowing greater judicial case management at the discretion of the sheriff and keeping the relatives informed of various decisions taken by the Lord Advocate.

69. It is, therefore, thought that these amendments ought not to result in any additional costs and will be met within existing resources of COPFS and SCTS.

70. No estimate has been made for any provision which may be made in the FAI rules providing for funding to be made available to families to enable them to obtain legal representation at FAIs. This is because it depends upon what provision is made in those rules for that funding.

Benefits

71. The Bill also provides for a preliminary hearing to be heard in every case. As the purpose of the preliminary hearing is to try to establish how much evidence needs to be heard at the FAI hearing itself, to encourage prior agreement of the facts, this may have a beneficial impact on the duration and, therefore, the costs of the FAI, though this is impossible to quantify.

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

Costs of other bodies, individuals and businesses

73. It is not envisaged that these amendments would have any significant impact upon the costs of other bodies, individuals and businesses.
4. To provide for the enforcement of the sheriff’s recommendations

74. The Bill makes various amendments which are intended—

- to emphasise that an FAI serves two purposes, not just to ascertain the circumstances of the death but also to determine what lessons can be drawn from that death as to what action requires to be taken, or not to be taken, in order to prevent further deaths in similar circumstances in the future. These lessons may form the basis of the recommendations made by the sheriff under section 22,

- to provide for the enforcement of those recommendations by a court order, which, if not complied with, can lead to criminal prosecution (section 25), and

- provide for the sheriff to give advance notice and a warning notice to any person to whom a recommendation is addressed (section 22(4) and 23) and to provide for an appeal by that person to the Sheriff Appeal Court and to the Court of Session against that recommendation (sections 26-31).

75. There are 50–60 FAIs per annum on average (with only 33 commenced in 2013) and sheriffs make recommendations in only around a third of these. So that means that at present there are likely to be fewer than 20 cases where recommendations are made in any year. Even if these numbers were to continue to be the case, it is not known how many persons these recommendations would be addressed to in the future.

Costs on the Scottish Administration

76. These amendments will impose new and additional functions on the sheriff to give warning and advance notices, the Lord Advocate to monitor compliance with the recommendations, the civil appeal processes against a recommendation and, in the event of any prosecution, the criminal process.

77. Given the low volume of such recommendations in any year, it is thought that the cost of giving such notices to persons and checking their responses, even if the recommendation was made to more than one person, would be met within the existing resources of SCTS and COFPS.

78. As the persons to whom such recommendations are addressed are given the opportunity of making representations to the sheriff before the recommendations are made, it is thought that this would reduce the number of cases where appeals are made against the making of the recommendation to the Sheriff Appeal Court and the Court of Session. It is therefore thought that there should be no more than one or two such appeals in any year and that any appeal will be in short compass, taking no more than a few hours of court time each. Extrapolating from Table 2 above, the estimated annual cost is £5,000.

79. As the persons to whom such recommendations are addressed are given various opportunities to comply with the recommendation, it is not anticipated that there would be many cases which would result in the Lord Advocate applying to the sheriff court for an order to require compliance and even fewer which will result in a criminal prosecution. The few cases that are prosecuted will produce an income for the State in the form of the fine. The net annual cost is, therefore, difficult to estimate but will be minimal.
Costs of other bodies, individuals and businesses

80. It is not envisaged that these amendments would lead to any increase in legal aid costs but, depending upon the nature of the recommendations, they might have a significant impact upon the costs of other bodies, individuals and businesses. However, this is difficult to quantify.

5. Re-opening the inquiry

81. Lord Cullen suggested that there could be a basis for re-opening an FAI if new evidence becomes available which could affect the FAI findings and any recommendations in the determination. The Bill makes provision for this in section 32.

82. In these cases, the Lord Advocate will decide if further proceedings are appropriate (i.e. if it is in the public interest and it is likely that the new evidence will materially affect the original determination). The sheriff is to have the discretion to determine whether the original FAI is to be re-opened, or whether a fresh FAI into the same death or deaths is appropriate. The sheriff’s decision is likely to be based on how much of the original determination would be affected by the new evidence which has come to light.

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

Costs on the Scottish Administration

84. As the Financial Memorandum to the Government’s Bill points out, COPFS will be responsible for preparing the evidence for any further inquiry proceedings; therefore, this provision will impact on it the most. The power will be at the Lord Advocate’s discretion and it will be a matter for COPFS to resource it appropriately.

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

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

6. FAIs in cases involving work related deaths

87. Section 13 of the Bill provides that, in the case of an FAI into a work related death, the Lord Advocate is to apply for such an inquiry before a specialised sheriff dealing with personal injury cases or the specialised sheriff court dealing with personal injury cases on an all-Scotland basis.
These documents relate to the Inquiries into Deaths (Scotland) Bill (SP Bill 71) as introduced in the Scottish Parliament on 1 June 2015

88. This only applies when the Lord President of the Court of Session has provided for such specialised sheriffs and an order has been made under section 41 of the Courts Reform (Scotland) Act 2014 providing for an all-Scotland personal injury court.

Costs on the Scottish Administration

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

90. It is not expected that these amendments will lead to any significant additional costs to SCTS because it should be no more than a redeployment of resources across sheriff court business.

7. FAI rules

91. Section 34 of the Bill empowers the Court of Session by act of sederunt to make rules of procedure for FAIs. Unless the draft rules are submitted to the Court of Session by the SCJC, the Court of Session requires to consult the SCJC before making the rules.

92. Until the SCJC is given this function, the rules are to continue to be made by the Scottish Ministers (schedule 1).

Costs on the Scottish Administration

93. As the new rules will continue to be made by the Scottish Ministers until the SCJC takes on the function of making draft rules, this will not result in any significant additional costs to Scottish Ministers.

94. The Financial Memorandum to the Government’s Bill indicates that the SCJC will take on this function in 2018 and, by that time, there will not be a substantial workload for it to undertake as the rules will have already been drafted and its function would simply be to review their working. It will therefore be able to accommodate this function under existing resources as the work on courts reform will have reduced by 2018 with staff working on other areas, including Tribunals and FAI Rules.

IMPLEMENTATION

95. It is anticipated that COPFS will record FAI cases and maintain statistics so that there can be an assessment of the reforms.
MEMBER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 1 June 2015, the member who introduced the Bill (Patricia Ferguson MSP) made the following statement:

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

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 1 June 2015, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Inquiries into Deaths (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
These documents relate to the Inquiries into Deaths (Scotland) Bill (SP Bill 71) as introduced in the Scottish Parliament on 1 June 2015

INQUIRIES INTO DEATHS (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

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