Justice Committee

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

Written submission from the Scottish Legal Action Group (SCOLAG)

1. In this response to the call for evidence on the Bill as drafted SCOLAG will highlight those areas of the Bill which in the Group’s view have fallen short of what the consultation respondents might have hoped for / expected. While it is anticipated that some other individuals or groups may wish to respond to the proposals in so far as they related to the provision of Legal Aid for bereaved families, the Group will focus instead on those matters not related to funding. The Justice Committee has welcomed views on a number of specific areas and some of these areas are covered in this response.

2. SCOLAG is supportive of the extension of the mandatory FAIs to cover the death of a child under 18 while kept in secure accommodation. However we are disappointed that the deaths of those subject to compulsory detention by a public authority (as defined by the Human Rights Act) have not been included in the mandatory category. We consider that it is entirely appropriate for the state to investigate the deaths of those, for example, detained under mental health legislation. We note that the Royal College of Psychiatrists in Scotland has welcomed such an exclusion on the grounds that there would be no benefit in there being such FAIs and that it “would have done nothing to address the stigma and discrimination that people with mental health problems have to deal with” (http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/FA1_RCPsych_in_Scotland.pdf). We respectfully disagree.

3. In order to foster and maintain trust in state institutions in which a high degree of trust and responsibility is involved, we believe that it is appropriate they should be subject to the oversight of the FAI regime. Even if many of these patients die from natural causes, this is no different from the current position in respect to many prison deaths. It is also often the case that these “natural causes” deaths can reveal unsafe conditions and poor practices which in turn can allow lessons to be learned. In the prison environment, there are several examples of “uncontroversial”, “natural causes” deaths which, because there was an FAI held, led to lessons being learned. One example was the FAI into the death of Scott Welch (March 2014, Dundee, Sheriff A Brown) where the use of handcuffs on a prisoner dying in hospital was of concern to the learned sheriff. It was not suggested that this contributed to the death in any way, but it is, in our view, often only through evidence being adduced at FAIs and sheriffs making such observations that practices change. Furthermore, we do not understand the Royal College’s view that holding such FAIs can be said to impact one way or another on mental health stigma or discrimination. In fact FAIs often result in better practices which is surely to the benefit of those detained under mental health legislation.

4. Furthermore, if the death is unexceptional and no lessons can be learned, it is certainly open to the COPFS and other parties to tender a lengthy joint minute of
agreement at the bar and to have, effectively, an FAI in formal terms only with no oral evidence adduced. This occurs frequently in prison FAIs and sum total of the court “appearance” can sometimes be 15 minutes only.

5. SCOLAG is pleased with the proposed power of the sheriff to make “recommendations” at the conclusion of the FAI. Recommendations can include reasonable precautions, improvements to or the introduction of systems of working, or the taking of any other steps which might realistically prevent other deaths in similar circumstances. However, while we agree that these recommendations should not be obligations in a legal sense, we do not consider the system proposed for the monitoring of the responses to be sufficiently robust.

6. Effectively, the proposal for the Scottish Courts and Tribunals Service (SCTS) to publish the responses (or a notice stating that a party to whom a recommendation was made has not responded) requires the media to monitor the SCTS website and to report on the published responses (or lack thereof). However, we do not consider this to be a role which ought to be undertaken by the SCTS for two reasons: firstly, the role of the judiciary and its connected structures should, in our view, end at the conclusion of the FAI: neither sheriffs nor the courts administration ought to have involvement past that point; secondly, the SCTS website is unlikely, in our view, to attract “hits” from those outwith the legal profession and some print media. If the objective of the Bill is to make parties to whom recommendations are made account for what they have or have not done, then in our view it is the Scottish Government which ought to be reporting on compliance. As we said in our response to the consultation, this is unlikely to be too onerous a task given the small number of FAIs there are per year and the even smaller number at which recommendations are made. If the Government was to report on compliance, it is more likely, in our view, that members of the public and other forms of media will see the responses. It is more transparent.

7. We are supportive of the holding of preliminary hearings before all FAIs however we think the proposed case management could go further. We are of the view that a “note of issues” or “note of proposed argument / proposed findings” style document should be explored and that all parties should be required to submit such a document in advance of the preliminary hearing. We submit that without such a practice being adopted, it is likely that parties could turn up to preliminary hearings and inform the court that investigations remain ongoing without any substantive progress being made / evidence being agreed.

8. SCOLAG considers that more information needs to be given on how FAIs into deaths abroad would work in practice before comments can be provided. We would require to know much more about the procedure and what processes would be in place for the ingathering of evidence / citation of witnesses etc.

9. SCOLAG considers that more information needs to be given on the situations in which it is envisaged that an FAI would be re-opened / a fresh inquiry instructed. SCOLAG takes the view that a line should be capable of being drawn after which point
an inquiry cannot be re-opened / a fresh inquiry instigated. This is for the sake of the families as well as the other interested parties. We are not persuaded that this is necessary.

10. SCOLAG welcomes the fact that three FAI centres will not be introduced but the Group is concerned that FAIs can take place outwith the sheriffdom connected to the death. We agree that FAIs should when possible take place in buildings other than courts, but consider that the distance the family and witnesses have to travel must be a primary consideration when determining whether to hold an inquiry in a different sheriffdom. Local knowledge must be preserved.

SCOLAG
28 April 2015