

Justice Committee

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

Written submission from the Crown Office and Procurator Fiscal Service

Summary of Key Points

- The Crown Office and Procurator Fiscal Service (COPFS) welcomes the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill which implements many of the recommendations made by Lord Cullen in his review of the operation of the Fatal Accident Inquiry legislation.
- Many of Lord Cullen's recommendations were addressed to COPFS and those recommendations (recommendations 12 to 17) have been implemented with the launch of the Scottish Fatalities Investigation Unit (SFIU).
- COPFS considers the Bill strikes the right balance in extending the mandatory category in relation to deaths in legal custody and maintaining the power of the Lord Advocate to exercise his discretion to hold a FAI into the death of someone subject to detention by a public authority.
- COPFS are content that the current system in relation to discretionary inquiries is maintained and welcome the clarification on the face of the Bill that the purpose of such an inquiry is not to establish civil or criminal liability.
- In relation to the power to hold FAIs into deaths abroad COPFS recognises the limitations on this power.
- COPFS welcomes the flexibility that provision in sections 11,12 and 13 will bring to the holding of FAIs and is of the view that the formalisation in statute of a preliminary hearing system will bring consistency of approach and assist in focusing the issues to be addressed in any Inquiry. All of these features of the Bill should assist in the overall speeding up of the holding and concluding of FAIs.
- Although it is anticipated that the provisions in relation to re-opening an FAI where fresh evidence comes to light will be used sparingly COPFS is of the view these provisions are desirable.
- COPFS welcomes the notice procedure provided for in section 14 of the Bill. Although Lord Cullen recommended that, in cases in which an FAI is mandatory, the Procurator Fiscal should apply for an FAI at an early stage after death, COPFS considers that this could add an unnecessary layer of procedure in many cases. In the majority (59%) of cases relating to deaths in the course of employment reported to the Health and Safety Division of Crown Office where there were criminal proceedings which had concluded in the last 4 years no mandatory inquiry was held because it was considered the circumstances of the death had been sufficiently established in criminal proceedings. Families may be further distressed if a FAI was formally opened but then did not take place because of the decision that criminal proceedings had fully established the facts. Presently COPFS provides a contact point for information to nearest relatives and ensures families are kept up to date with progress. Procurators Fiscal meet families and nearest relatives are given the opportunity to be fully engaged in the investigative process. If a FAI is not being petitioned for in such circumstances now COPFS do explain such

decisions as a matter of standard practice and, if requested, provide a written explanation to families.

- COPFS is aware of the issues that have been raised in relation to the time taken to hold a FAI from the time of death. COPFS are committed to investigating deaths timeously, but will not compromise thoroughness for speed as this could compromise a Sheriff's ability to make proper findings and/or recommendations.
- The time taken for holding a FAI can be affected by many factors such as:
 - (i) Time elapsed between death and it being reported to the Procurator Fiscal
 - (ii) Criminal proceedings are required to take place (or at least be ruled out through a detailed investigation) before consideration can be given as to whether a FAI should take place all of which inevitably takes time.
 - (iii) In many cases the Procurator Fiscal is dependent on investigations carried out by regulatory authorities before COPFS can complete its own investigations. In complex cases this can take a significant period of time and is not something the Crown can control.
 - (iv) Many deaths investigations also require expert evidence and it can take time to identify the necessary expert and obtain all relevant reports.
 - (v) Timing of the Inquiry is also dependent on the availability of suitable court time which is allocated by the Sheriff Principal.
- COPFS recognises the importance of holding an FAI as soon as possible once a decision is taken that an FAI is to be held. The Crown now petitions the court to hold a FAI within 2 months of the instruction to hold an FAI.

Submission

1. The Crown Office and Procurator Fiscal Service (COPFS) welcomes the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill which takes forward many of the recommendations from Lord Cullen's review of the operation of the fatal Accident and Sudden Deaths Inquiry (Scotland) Act 1976 which reported in 2009.

2. As outlined in paragraph 4 of the Explanatory Notes to the Bill, many of the recommendations from Lord Cullen's review were addressed to COPFS and have been implemented. It may assist the Committee to provide details of how COPFS has implemented these recommendations.

3. The Scottish Fatalities Investigation Unit (SFIU) was launched in October 2010 and incorporated the recommendations contained in the review relating to the work of the Crown Office and Procurator Fiscal Service.

4. The SFIU took on responsibility for investigating all sudden, suspicious, accidental and unexplained deaths allowing death investigation to be carried out thoroughly and expeditiously by dedicated specialists. It became the central point for the provision of advice to Procurators Fiscal investigating deaths; for liaison with Crown Counsel regarding the direction and focus for deaths investigation; for liaison with the nearest relatives of the deceased's family and for providing them with reasons where the Lord Advocate did not apply for a FAI. Such communication was

provided in person at a meeting, by telephone or in writing depending on what method of communication was considered most appropriate by the family in the circumstances.

5. With the introduction of a geographic Federation structure within COPFS from April 2012, the SFIU was reorganised to mirror the Federation structure. There are now three SFIU teams, one in each Federation (SFIU North, SFIU East and SFIU West) in addition to the National SFIU team which is the central point for the provision of advice to colleagues in the SFIU teams, for liaison with Crown Counsel and with primary responsibility on policy matters relating to deaths. The Heads of the three SFIU teams report directly to the overall Head of National SFIU who is a Senior Procurator Fiscal.

6. Building on this and in implementing the recommendations, SFIU have created a database of cases which differentiates between mandatory and discretionary FAIs and records relevant dates and detail in order to track the progress and timings of cases and to maintain statistical data.

7. SFIU have also captured details of suitable experts who have assisted in investigations previously and this will be updated on a regular basis.

8. Current cases have been prioritised to ensure that any cases which have been awaiting resolution for some time are being expedited.

9. The current structure of SFIU provides the necessary contact point in line with recommendation 15. There is a very experienced dedicated member of VIA (COPFS' Victim Information and Advice service) working in SFIU who provides support to families.

10. All of these changes demonstrate a commitment by COPFS to deliver expert, thorough and timely investigation of deaths.

The Bill

11. In addition to ensuring that considerations of public interest are met, at the heart of any investigation by the Procurator Fiscal of sudden, suspicious, accidental or unexplained death is the need to try and obtain answers for the relatives as to the cause of death and why the person died. In the vast majority of deaths investigated by the Procurator Fiscal there is no requirement for a public hearing- the family can obtain the answers they need in private and, where the causes are not complex within a short period of time, without the formality and distress that formal court proceedings can bring. In all deaths which require further investigation, COPFS conduct the investigation and aim to advise the nearest relatives of the outcome within 12 weeks, in at least 80% of cases. In the year 2014/15 91 % of cases met that.

12. The opportunity has been taken in the Bill to modernise the system of Fatal Accident Inquiries based on Lord Cullen's recommendations. The fundamental purpose of a fatal accident inquiry has been set out in the Bill as being to establish

the circumstances of the death and consider what steps if any might be taken to prevent other deaths in similar circumstances.

Mandatory category

13. COPFS welcomes the modernisation of the category for mandatory FAIs by the updating and extending of the definition of deaths in legal custody. We note that Lord Cullen recommended the mandatory category should include the death of any person subject to detention by a public authority but that the Royal College of Psychiatrists and the Mental Welfare Commission Scotland considered this was unnecessary in their responses to the Scottish Government consultation. COPFS considers the Bill strikes the right balance in extending the category for legal custody and maintaining the power of the Lord Advocate to exercise his discretion to hold a FAI into the death of someone subject to detention by a public authority. We also welcome the retention of the discretion of the Lord Advocate to decide not to hold a FAI where the circumstances of any death have been sufficiently established in criminal proceedings to the extent that an Inquiry is no longer necessary in the public interest.

Discretionary Inquiries

14. The holding of a discretionary inquiry will remain as a matter for the Lord Advocate acting in the public interest. It is important to underline the independence of the Lord Advocate in this role. All the facts and circumstances of the death will be considered, as will the views of the nearest relatives, in line with obligations under Article 2 of the European Convention on Human Rights, in taking the decision as to whether an inquiry in public is required. The decision of the Lord Advocate can and has been challenged by judicial review but it is notable that this remedy has only been used sparingly. An independent and objective investigation and assessment of the wider public interest by the Lord Advocate is required so that issues are appropriately considered and focussed. In this way competing interests in whether or not a FAI should be held are properly balanced. COPFS is content that this aspect of the current system is maintained and welcome the clarification on the face of the Bill that the purpose of an inquiry is not to establish civil or criminal liability.

Deaths abroad

15. With regard to the power to hold a fatal accident inquiry into deaths abroad it must be stressed that there will be limitations on what COPFS can actually act on and the Bill does not have retrospective effect. A FAI could only be held if it is considered that the circumstances of the death have not been sufficiently established in the course of a foreign authority's investigation and where there is a real prospect that those circumstances would be sufficiently established in an Inquiry. It is important to note that it is the power to hold the inquiry that is provided for, not the power to investigate the death which occurred abroad. There may well be limitations to what can be established by COPFS regarding deaths which occur abroad. COPFS has previously assisted relatives in obtaining information about investigations abroad on an informal basis only. Even in criminal proceedings it can take a significant period of time to secure evidence from abroad using Mutual Legal Assistance (MLA) treaties as the process relies heavily on the goodwill of the

requested state to provide the request with the relevant degree of priority. For instance the standard period to obtain evidence from the United States is six to eight months and in many cases it takes longer. However, MLA treaties could not be used to obtain evidence from abroad for a FAI as these treaties are restricted to criminal proceedings. Accordingly, COPFS will not have the power to compel the attendance of witnesses or the production of crucial evidence from foreign countries for FAIs within the scope of mutual legal assistance. If it is possible to obtain any evidence at all it is likely to take far longer than it does in criminal proceedings. As a result there may be little further that can be discovered by the holding of a FAI than was discovered by the local investigation, and this may only serve to prolong frustration and distress for the family, particularly where there is likely to be a considerable passage of time before a FAI can be held as a result of the lack of Crown investigative powers. Additionally, were a FAI to be held into a death that occurred abroad and a Sheriff made recommendations with a view to preventing other deaths occurring, it is hard to see how such recommendations could be taken forward with the relevant foreign authority involved.

Places at which Inquiries may be held and jurisdiction

16. COPFS welcomes the flexibility that the provisions in sections 11, 12 and 13 bring to the holding of FAIs. Some Inquiries have been held in venues other than sheriff courts. The removal of FAIs from formal court surroundings can improve the facilities available for the family of the deceased and witnesses. It is desirable to remove FAIs from a sheriff court which is busy with other civil and criminal business. In terms of jurisdiction, in many cases there may be little connection between the court house, place of death, the witnesses, or the nearest relatives and accordingly the place of death need not be the overriding factor in choosing the location for a FAI to be held. The ability to hold a FAI into multiple deaths whether or not they occurred in the same sheriff court jurisdiction ensures that the fullest evidence can be presented to one sheriff.

Pre Inquiry Procedure Notice Procedure

17. CCOPFS welcomes the notice procedure provided for in section 14 of the Bill. We note that Lord Cullen recommended that, in cases in which an FAI is mandatory, the PF should apply for the FAI at an early stage after a death, so that the sheriff, relatives and other interested parties can be informed as to the state of investigation, the expected timescale and any factors likely to affect progress.

18. However, it is considered that this could add an unnecessary layer of procedure in many cases and that a much larger number of FAIs would then require to be applied for initially but the majority of these would not proceed because it is likely that criminal proceedings will be instigated and the Lord Advocate may ultimately consider that an FAI is not necessary as the circumstances of death have been sufficiently established in those criminal proceedings.

19. In relation to deaths in the course of employment which were reported to Health and Safety Division of COPFS, 27 cases were concluded in the last four years: of those, seven resulted in no criminal proceedings being taken and seven

mandatory inquiries were then held. In 20 cases a prosecution took place and 16 inquiries were waived by the Lord Advocate: four were instructed. In 59% of those cases relating to deaths in the course of employment which were reported to the Health and Safety Division and had criminal proceedings concluded, no mandatory inquiry was held because it was waived in terms of section 1(2) of the 1976 Act.

20. However, COPFS recognises that it is crucial that families are kept up to date with the investigation into a loved one's death. COPFS provide a contact point for information to nearest relatives on the investigation of deaths by the Procurator Fiscal so that they can raise any concerns and issues directly with that person. Procurators Fiscal meet with the families to explain the process of the investigation and to keep the family up to date with progress. Whether or not a mandatory FAI is ultimately held, the nearest relatives are given the opportunity to be fully briefed on the investigative process. This process can sometimes lead to additional investigation being undertaken by the Procurator Fiscal to address further concerns raised by the family.

21. Families may become subject to further distress if a FAI was formally opened raising their expectation that there would be evidence led at a FAI, but then did not take place because of the Lord Advocate's decision that the matter had been fully explored in criminal proceedings.

Preliminary hearings

22. The provision of the preliminary hearing system in FAIs is welcomed as this will aid early discussion once the decision has been made that a FAI is to be held. The practicalities of where and when the FAI will take place, the state of preparation of all parties, and which parties will be represented at the FAI can all be explored at the earliest opportunity. This improvement to the process has already been put in place. The Crown guidance requires that Procurators Fiscal seek a Preliminary hearing in every FAI when a petition is lodged with the court. The Sheriff Principal of Glasgow and Strathkelvin has issued a practice note providing that preliminary hearings should be fixed 4 weeks before the date fixed for an inquiry in all cases in his jurisdiction. COPFS welcomes the formalisation of the preliminary hearing system in statute to provide certainty and clarity to all who are involved in the formal proceedings in any jurisdiction about the issues which should be considered at the FAI, the timing, location and timescales.

23. We welcome the flexibility built into this process to allow the Sheriff to dispense with the requirement for the preliminary hearing, in relation to those FAIs where it is clearly not necessary. For instance, in many mandatory FAIs the facts are clear cut and are likely to lead to only formal findings of where when and why a death occurred. The notice procedure will allow considered decisions to be taken on whether the preliminary hearing should be fixed.

Ability to re-open a FAI: sections 28 to 33

24. It is desirable that there is provision to have further proceedings where fresh evidence comes to light which would materially affect a finding or recommendation in

a determination. It is anticipated that this would only be used very sparingly given the thorough investigations which take place.

Timing of FAIs

25. COPFS is aware of the issues that have been raised in relation to the time taken to hold an FAI from the time of death.

26. COPFS is committed to investigating deaths as timeously as possible, but will not compromise thoroughness for speed. Proceeding to FAI without carrying out the most thorough of investigations could result in incomplete evidence being put before the Sheriff who would then not be able to make a full determination.

27. The time taken for holding FAIs can be affected by many factors:

- Time may have elapsed between the death occurring and it being reported to the Procurator Fiscal.
- In some cases, criminal proceedings will require to take place before the FAI can take place. This inevitably takes time. Even when criminal proceedings do not take place, there can be considerable enquiries which need to be carried out to determine whether such proceedings are necessary and this requires to be completed prior to considering whether an FAI should be held.
- In many of the deaths in which FAIs take place the Procurator Fiscal is dependent on the outcome of investigations carried out by the regulatory authorities which are bound by statute to carry them out. For example, the Air Accidents Investigation Branch (AAIB), the Health and Safety Executive (HSE), the Marine Accident Investigation Branch (MAIB) and the Rail Accident Investigation Branch (RAIB). These can be required in the most complex of cases. The Crown currently has no power to direct agencies such as these but cannot complete its own investigation until the safety investigation which establishes the cause of any fatal accident or work related incident has been completed by the relevant regulatory authority. This can hamper progress in the Crown investigation significantly and can cause delay in the holding of a FAI. For instance, representations had to be made recently by the Solicitor General and the First Minister to UK Ministers at Westminster regarding the time taken to see information being provided to the Crown by air accident officials investigating the Clutha helicopter crash and concern in relation to the time being taken to complete that AAIB investigation.
- Many of the deaths which result in discretionary FAIs are complex and require COPFS to obtain expert evidence. Identifying the necessary expert can take time but it is very important that the most appropriate experts are requested to provide reports. The timing of the provision of reports is not something that COPFS can control and we cannot compel experts to provide them within set timescales. It can also be the case that the experts themselves raise further issues which require additional time for further investigation or instruction of further experts to provide reports.

- The timing of the hearing is also dependent on the availability of suitable court time which is the domain of the Sheriff Principal.

28. COPFS recognises the importance of holding an FAI as soon as possible once a decision is taken that an FAI is to be held. To this end, the Crown now petition the relevant court for FAI within 2 months of Crown Counsel instruction to hold a FAI.

Practical implications of the Bill

29. The Bill, in large part, implements those recommendations made by Lord Cullen that have not thus far been implemented. The Bill provides a more flexible approach to where FAIs can take place which will assist families and shorten the time taken for holding a FAI, allowing for greater use of alternative accommodation rather than Sheriff courts. The formalisation in statute of a preliminary hearing system will allow for consistency of approach across Scotland to focusing issues in advance of an inquiry. It is hoped that this will shorten the duration of Inquiries and reduce the occurrence of adjournments which can impact on the length of time taken to conclude a FAI. The Bill also extends the category of mandatory FAIs in an appropriate and proportionate way and now allows in certain limited circumstances for there to be a FAI into a death which occurred abroad.

Catherine Dyer
Crown Agent & Chief Executive
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