INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC. (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 Fatal Accidents and Sudden Deaths etc. (Scotland) Bill introduced in the Scottish Parliament on 19 March 2015:

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

A Policy Memorandum is published separately as SP Bill 63–PM.
INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. 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 section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

3. The Bill seeks to modernise the legislative framework for Fatal Accident Inquiries (FAIs) in Scotland. The provisions in the Bill take forward many of the recommendations requiring primary legislation from Lord Cullen’s Review of the operation of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (“the 1976 Act”), which reported in 2009. The Scottish Government issued its response to the review in 2011, accepting the majority of Lord Cullen’s 36 recommendations.

4. The recommendations from Lord Cullen which were addressed to the Crown Office and Procurator Fiscal Service (COPFS) have already been taken forward by the establishment of the Scottish Fatalities Investigation Unit (SFIU).

5. The Bill will implement the remaining recommendations that the Government accepted in its response in 2011. A public consultation on the proposals of the Bill was carried out from 1 July to 9 September 2014 and responses published on 15 October 2014.

6. The Bill will repeal the 1976 Act and enact new provisions to govern the system of FAIs in Scotland. The Bill does not attempt to legislate for all of the recommendations made by Lord Cullen that were accepted by the Government. Some of the changes recommended will be implemented by the Lord President and the Scottish Courts and Tribunal Service (SCTS). Other changes will be implemented through FAI Rules to govern the procedure. The Bill seeks to set out the framework within which the rules will add the necessary detail.

7. For the purposes of this document, the term FAI will be used to describe an inquiry under the 1976 Act and this Bill.

1 Lord Cullen, Report of findings of Review of Fatal Accident Inquiry Legislation:
2 Scottish Government, Response to the Recommendations from the Review of Fatal Accident Inquiry Legislation:
   http://www.scotland.gov.uk/Publications/2011/03/18150120/0
3 Consultation on proposals to reform Fatal Accident Inquiries legislation:
   http://www.scotland.gov.uk/Publications/2014/07/6772
4 Responses to the consultation on proposals to reform Fatal Accident Inquiries legislation:
   http://www.scotland.gov.uk/Publications/2014/10/8764
8. The Bill is in 41 sections and 2 schedules.

9. Section 1 sets out the nature and purpose of an inquiry under the Bill, with sections 2 to 7 describing the situations where an inquiry must or may be held.

10. Section 8 provides for the Lord Advocate on request to explain to close relatives and partners why an inquiry is not to be held.

11. Sections 9 to 13 make general provision, firstly, relative to the procurator fiscal’s investigation (section 9), then for who may participate in an inquiry (section 10), thirdly, for the location of the inquiry and the jurisdiction of the sheriff (sections 11 and 12), and lastly for inquiries into multiple deaths (section 13).

12. Sections 14 to 17 provide for the procedure that precedes the inquiry proper. This includes the procedure for initiating the inquiry (section 14) and for giving notice of it (section 16), provision for preliminary hearings (section 15), and provision for the agreement of undisputed facts between the procurator fiscal and the participants (section 17).

13. Sections 18 to 24 provide for the inquiry itself. This includes provision relating to the powers of the sheriff (section 18), provision about evidence and witnesses (section 19), a requirement that the inquiry be held in public (section 20), and publishing restrictions and offences relating to those restrictions in relation to the identification of children (sections 21 and 22). Section 23 permits a sheriff to appoint a person (known as an assessor) to assist him/her. Finally, section 24 prohibits the sheriff from awarding expenses in relation to the proceedings.

14. Sections 25 to 27 provide for the sheriff’s findings, dissemination of his/her determination, and compliance with any recommendations.

15. Sections 28 to 33 make provision for the circumstances in which there might be further proceedings and the procedures for those. Section 31 makes provision where these further proceedings are to be a re-opening of the original inquiry and section 32 where they are to be a fresh inquiry.

16. Section 34 provides for the Court of Session to make rules relating to procedure, schedule 1 (which is introduced by subsection (6)) makes provision in relation to the functions of the Scottish Civil Justice Council and sets out transitional provisions relating to the making of rules. Section 35 makes provision for the designation of specialist judicial officers in relation to FAIs.

17. Finally, sections 37 to 41 make general provision in relation to the Bill and schedule 2 lists modifications of existing legislation.
COMMENTARY ON SECTIONS

Inquiries into certain deaths

Section 1 - Inquiries under this Act

18. Subsection (1) provides that where an FAI is to be held into a death, it is the duty of the procurator fiscal to investigate the death, and arrange for an FAI to be held into it. Subsection (2) provides that the FAI is to be conducted by a sheriff (this may include a sheriff principal) as defined in subsection (5)(b). Subsection (3) makes it clear that the purpose of an FAI is to establish the circumstances of the death and to consider whether any precautions could be taken which may prevent other deaths in similar circumstances. Subsection (4) makes it clear that it is not the purpose of FAIs to establish civil or criminal liability. They are not adversarial hearings and are not designed to be like civil litigation. Nor have they any connection to criminal proceedings. The definition of sheriff in subsection (5)(b) means that when the Bill refers to sheriff it is referring to a sheriff of the sheriffdom in which the FAI is, or is to be, held. Section 12 makes provision about where the FAI is to be held. The powers of the sheriff can also be exercised by a summary sheriff, given the effect of section 36 of the Bill, and the reference to sheriff also includes the sheriff principal given the effect of section 134(2) of the Courts Reform (Scotland) Act 2014.

Inquiries into deaths occurring in Scotland

Section 2 - Mandatory inquiries

19. Section 2 sets out the circumstances in which an FAI is mandatory. Under subsection (3) an FAI is mandatory if the person died in Scotland as a result of an accident in Scotland, in the course of the person’s employment or occupation. This replicates the effect of section 1(1)(a)(i) of the 1976 Act.

20. Under subsection (4) an FAI is mandatory if the person has died in Scotland and was in legal custody, or was a child required to be kept or detained in secure accommodation. A person being in legal custody or secure accommodation is defined by the status of that person regardless of the person’s physical location at the time of the death. Accordingly if a person dies in hospital who is at the time of death still serving a custodial sentence, an FAI must be carried out. The effect is the same as that in section 1(1)(a)(ii) and (4) of the 1976 Act.

21. Subsection (5) defines “legal custody”. This includes being imprisoned or detained in a penal institution, being in police custody, being held in custody on court premises or being detained in service custody premises. 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.

22. The inclusion of a death of a child required to be kept or detained in secure accommodation is an addition to the mandatory categories in the 1976 Act. “Child” is defined in section 38 as a person who has not yet reached the age of 18 and secure accommodation takes its definition from regulations made under the Public Services Reform (Scotland) Act 2010, thus
keeping pace with any change to the meaning of such accommodation which may occur from
time to time.

23. By providing that an FAI is to be held in these circumstances, the effect of this section is
to require the procurator fiscal to investigate the circumstances of the death and arrange for a
FAI to be held.

Section 3 – Mandatory inquiries: exceptions

24. This section allows the Lord Advocate to decide that an FAI is not to be held into a death
which falls within the categories of death set out in section 2 (mandatory inquiries). 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.

25. The other proceedings which the Lord Advocate is permitted to rely upon 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. 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 (eg Dunblane inquiry 1996) or a series of
events (eg 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.

26. 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 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 mandatory 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. So
if the discretion is not exercised the result under the Bill is that (if the circumstances are within
section 2(3) or (4)) there will be an 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).

27. In summary, this section permits the Lord Advocate to decide that the circumstances of
the death have been sufficiently established in certain specified proceedings and therefore no FAI
is necessary. If the circumstances have not been established then an inquiry must be held. But
these documents relate to the inquiries into fatal accidents and sudden deaths etc. (scotland) bill (sp bill 63) as introduced in the scottish parliament on 19 march 2015

the bill also permits the lord advocate to decide that even where the circumstances have been established, an inquiry could still be held. there may be deaths where the lord advocate may conclude that even though the circumstances have been established, the public interest demands that a sheriff should consider whether recommendations should be made in the public interest as to how deaths in similar circumstances might be avoided in the future.

section 4 – discretionary inquiries

28. section 4 reproduces the effect of section 1(1)(b) of the 1976 act to give the lord advocate discretion to require an inquiry to be held into a death in scotland if they consider 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 do so. subsection (2) provides that the power to hold discretionary inquiries does not apply to a death where a mandatory inquiry is required.

section 5 – certain deaths and accidents to be treated as occurring in scotland

29. section 5 reproduces the effect of section 9 of the 1976 act as a restatement of reserved law. section 5 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 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.

inquiries into deaths occurring abroad

section 6 – inquiries into deaths occurring abroad: general

30. section 6 permits an fai to be held into a death of a person ordinarily resident in scotland, if it occurs outwith the united kingdom and the body is repatriated to scotland (subsection (1)). 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). section 6 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 (see the use of the words “outwith the united kingdom” in subsection (1)(a)). the effect of subsection (2) is that this section does not apply to deaths of service personnel abroad, which are dealt with in in section 7.

31. subsection (3) sets out the criteria for the lord advocate’s discretion to decide if an fai should be held into such a death. as for other discretionary fais, the lord advocate will consider whether the death was either sudden, suspicious or unexplained, or occurred in circumstances giving rise to serious public concern. the lord advocate must also consider whether the circumstances of the death have already been established in the course of an investigation by the appropriate authorities in the country where the death occurred, and whether there is a real prospect that those circumstances would be sufficiently established in a fai. the fai will only be held if the lord advocate decides that it is in the public interest to investigate the circumstances of the death. an fai into a death within this section will proceed in the same way as any other fai under the bill.
These documents relate to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (SP Bill 63) as introduced in the Scottish Parliament on 19 March 2015

Section 7 – Inquiries into deaths occurring abroad: service personnel

32. Section 7 re-enacts section 1A of the 1976 Act which was inserted by section 12 of the Coroners and Justice Act 2009. Those provisions were inserted following a Legislative Consent Resolution passed by the Scottish Parliament on 21 May 2009\(^5\) and accordingly the Scottish Government’s position is that elements of section 7 restate reserved law. Section 12 permits the Secretary of State or the Chief Coroner to notify the Lord Advocate 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.

33. Section 7 of the Bill makes provision for an FAI to be held into such a death if it occurs while the person is in legal custody, or 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.

34. An FAI will be held if the Lord Advocate decides that it will be in the public interest so to do. Subsection (4) means that no inquiry can be held if the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established in criminal proceedings. An FAI into a death within this section will proceed in the same way as any other FAI under the Bill.

Reasons where inquiry not held

Section 8 – Reasons for decision not to hold an inquiry

35. Under section 8, where it is decided that an FAI is not to be held, the Lord Advocate must give reasons (in writing) for that decision. This duty only applies where the request is made by the spouse or partner (civil or cohabiting) or nearest relative of the deceased and the Lord Advocate is only required to respond to these persons. This reflects COPFS’ current practice and would cover situations such as when the Lord Advocate decides that an FAI should not be held in terms of section 4. Paragraph (b) includes a same sex couple living together.

Procurator fiscal’s investigation

Section 9 – Citation of witnesses for precognition

36. It will sometimes be necessary for the procurator fiscal to precognosce witnesses as part of a death investigation prior to determining whether there are to be further proceedings. Section 9 replicates section 2 of the 1976 Act to enable the citation of witnesses for precognition as part of that death investigation. Subsection (5) makes it an offence to fail to comply with an order made by the sheriff requiring a person to attend for precognition and subsection (6) sets out the penalty if convicted of that offence.

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Participants

Section 10 – Persons who may participate in the inquiry

37. Section 10 specifies the people who may participate in an FAI in addition to the procurator fiscal. The provisions in this section have been updated to capture modern relationships as the 1976 Act does not include civil or cohabiting partners. There may be circumstances where the deceased may not have been living with a spouse or civil partner at the time of death and may instead have been cohabiting with another person. This provision gives a cohabitee in such circumstances the right to participate in the FAI. The Bill’s description in section 10(1)(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.

38. The provisions preserve the effect of section 4(2) of the 1976 Act providing that, where the inquiry concerns a death at work, an inspector appointed under section 19 (appointment of inspectors) of the Health and Safety at Work etc. Act 1974 may also be a participant if he or she so chooses. In that limited regard, the Bill restates reserved law.

Location

Section 11 – Places at which inquiries may be held

39. The Scottish Ministers will be able to make regulations under section 11 to designate places at which a sheriff court may be held for the purposes of holding an FAI. Subsection (1) makes it clear that these places will be additional to the places already designated for the holding of sheriff courts under the Courts Reform (Scotland) Act 2014. “Places” in this sense means the towns and cities where sheriff courts are held – it does not mean specific sheriff court buildings as FAIs have already been held in other buildings.

40. An FAI may be held at a sheriff court building, but it may also be held in another building in a place designated under the 2014 Act or section 11 of the Bill. This allows the current practice of holding FAIs in buildings not usually used for court purposes (e.g. locations such as the Council Chamber in, for example, Aberdeen City Chambers and the Maryhill Community Centre in Glasgow, or in places where there is no sheriff court (e.g. Motherwell)).

41. Since the SCTS has the statutory responsibility for providing property for the Scottish courts under section 61(1) of the Judiciary and Courts (Scotland) Act 2008, the Scottish Ministers will only make regulations under subsection (1) following the submission of a proposal by SCTS – with the agreement of the Lord President – for the designation of a place for the holding of FAIs under subsections (2) and (3). However, this procedure will be subject to consultation with appropriate persons under subsection (4).

42. In making the regulations, the Scottish Ministers are to have regard to the SCTS proposal under subsection (5). Given the statutory responsibility which the Lord President has for the efficient disposal of business in Scotland’s courts under section 2(2) of the 2008 Act, and the equivalent responsibility of the SCTS set out above, the Scottish Ministers must obtain the consent of both the Lord President and the SCTS under subsection (6) before making those regulations. This power is subject to affirmative procedure.
Section 12 – Jurisdiction in relation to inquiries

43. Section 12(1) provides that an FAI may be held in any sheriffdom in Scotland regardless of the place of the death or (if applicable) any accident causing the death. This removes the requirement of a close connection between the place most closely connected with the circumstances of the death and the procurator fiscal for the sheriff court district relating to that place that is provided by section 1 of the 1976 Act. This will allow greater flexibility in the system of FAIs which may allow inquiries to be held more quickly if they can be accommodated in alternative accommodation. This flexibility still permits an FAI to be heard locally in relation to the circumstances of the death, however, and indeed it is expected that the majority of FAIs will be held in the same sheriffdom as the place of death.

44. Subsection (2) allows the Lord Advocate to choose in which sheriffdom the FAI is to be held, after consulting with the SCTS. It does not allow the Lord Advocate to choose the place or building within the sheriffdom where the FAI will be held, which will be a matter for discussion between the Lord Advocate (who will have been in contact with any relatives of the deceased), the sheriff principal and the SCTS. Ultimately the decision is for the sheriff principal under his or her powers relative to the efficient disposal of business contained in the Courts Reform (Scotland) Act 2014.

45. Subsections (3) and (5) allow the sheriff to transfer the FAI to another sheriffdom, but only after the procurator fiscal and the participants have been given an opportunity to make representations about such a transfer and only with the consent of the sheriff principal for that sheriffdom and the sheriffdom to which the FAI is to transfer. The transfer order may be made at the sheriff’s own initiative or at the instigation of the procurator fiscal or one of the participants at the FAI.

Inquiries into multiple deaths

Section 13 - Inquiry into more than one death

46. Section 13 permits a single FAI to be held into multiple deaths if they are as a result of the same accident or occur in the same or similar circumstances. The 1976 Act only allows inquiries into multiple deaths that occur in the same sheriffdom. This provision, along with section 12, means that one FAI may take place into multiple deaths regardless of the place where the deaths took place.

Pre-inquiry procedure

Section 14 - Initiating the inquiry

47. An inquiry is only to be held where the Lord Advocate makes a decision to that effect or where the Bill requires one to be held on a mandatory basis. Section 14 provides that where an inquiry is to be held, the procurator fiscal is to give notice to the sheriff of that fact. The procurator fiscal is also required to give the sheriff a brief account of the circumstances of the death so far as they are then known to the procurator fiscal, together with any other information which may be set out as required in FAI rules made by act of sederunt under section 34(1) of the Bill. Under subsection (2), the sheriff will set out in an order the date and place for the preliminary hearing to the FAI if one is to be held, and for the FAI itself, which need not be held at the same place. The sheriff will also grant warrant for the procurator fiscal and participants to cite witnesses.
48. Subsection (3) provides flexibility for the sheriff to not fix a date and place for the hearing, but only if a preliminary hearing is to be held and the sheriff considers it appropriate not to fix such a date. It is left to the discretion of the sheriff as to the circumstances in which it is not appropriate to fix a date; it may be that at this early stage the sheriff is unsure as to the scope of the FAI and may wish to hear submissions prior to fixing the date.

49. Subsection (4) allows the sheriff to vary a date and place fixed for the holding of a preliminary hearing or inquiry.

50. Subsection (5) makes it clear that, in deciding the date for the holding of the FAI, the sheriff must have regard to the desirability of holding the inquiry as soon as is reasonably practicable. This means that the sheriff must bear in mind the need to hold the inquiry soon, and while the inquiry need not be held immediately, that only practical aspects which require a delay be taken into account (such as available accommodation and reasonable time for participants to prepare) when choosing a date.

Section 15 – Preliminary hearings

51. Section 15 requires a preliminary hearing to be held before every FAI unless the sheriff dispenses with that requirement in accordance with rules made in an act of sederunt under section 34(1). The sheriff is given further power to reverse a decision not to hold a preliminary inquiry.

52. Further provision is to be made with regard to the content and purpose of preliminary hearings in rules made in an act of sederunt under section 34(1). The purpose of a preliminary hearing for an FAI is to consider the likely length of the proceedings, the state of preparedness of participants and the procurator fiscal, the amount of evidence and any areas for agreement of uncontroversial facts, and anything else that needs to be addressed before the inquiry proceedings can begin.

Section 16 – Notice of the inquiry

53. Once the date and location of the preliminary hearing and/or FAI hearing is fixed (in accordance with the sheriff’s powers under section 14), then section 16 places a duty on the procurator fiscal to notify those persons who the procurator fiscal considers to be persons who are entitled to participate in the FAI. Those who are entitled to be participants are set out in section 10. In addition, the procurator fiscal is also required to notify any person specified in FAI rules or in a category of person specified in FAI rules made in an act of sederunt under section 34(1). Subsection (3) provides that the procurator fiscal will also have to provide public notice of the FAI, the date and place of any preliminary hearing, and the date and place of the FAI.

54. The procurator fiscal is under a continuing duty to notify and publicise changes to the place or date of these matters, including notification of a preliminary hearing where the sheriff has reversed his or her decision not to hold one. For the avoidance of doubt, the procurator fiscal only has to notify directly those who appear to the procurator fiscal to be entitled to participate or whom he or she has to notify under FAI rules.
Section 17 – Agreement of facts before an inquiry

55. Section 17 provides that FAI rules will make provision about the agreement, before the start of the inquiry, by the procurator fiscal and the participants in an inquiry of uncontroversial facts which are unlikely to be disputed. This is to avoid the need for evidence to be led at the FAI about issues which are not in doubt and thus contribute to shortening the FAI. FAI rules are likely to set out the process by which agreement is to be reached, and include a duty to seek agreement.

The inquiry

Section 18 - The powers of the sheriff

56. Section 18 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, subject to the other provisions in the Bill or provision made by FAI rules by virtue of subsection (2).

Section 19 – Evidence and witnesses

57. Section 19 sets out that the procurator fiscal 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. In addition, subsection (2) enables the sheriff to instruct a participant in the FAI or the procurator fiscal to lead evidence on any matter relating to the circumstances of the death. The sheriff is not, therefore, dependent upon the procurator fiscal 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.

58. Subsection (3) 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.

59. Subsection (4) makes it clear that subsection (3) is subject to any provision made in rules in an act of sederunt under section 34(1).

60. Subsections (5) and (6) 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.

Section 20 – Inquiry to be conducted in public

61. Section 20 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.
The sheriff can make this order if the procurator fiscal or one of the participants applies for it, or may do so on his or her own initiative. The circumstances in which an FAI may be held in private have been left to the discretion of the sheriff, as the reasons may range widely from issues of national security to the need to protect children or other vulnerable persons.

Section 21 – Publishing restrictions in relation to children

62. Section 21 allows the sheriff to prohibit publication of material that could identify a child involved in an FAI. “Child” now means a person who has yet to reach the age of 18 years. The prohibited material which may lead to identification of the child includes, but is not limited to, the items listed in subsection (3). Under subsection (4), the sheriff may make such an order on his or her own initiative or on the application of the procurator fiscal or a participant in the FAI. Failure to comply with the sheriff’s order will constitute an offence under subsection (5), the penalty for which is set out in paragraph (6). The Bill recognises that some of those involved in the process of publishing, such as a newspaper distributor or retailer, may not be aware that the content of the publication is in breach of such an order and provides for a defence. The definitions of “publish” and “material” in subsection (8) are wide and include material published online. The Scottish Government proposes that the Order under section 104 of the Scotland Act 1998 referred to in the Policy Memorandum will extend the effect of publishing restrictions to England and Wales and Northern Ireland.

Section 22 – Offences by bodies corporate etc.

63. Section 22 applies where the publication offence in section 21(5) 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.

Section 23 – Assessors

64. Under section 23, 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 24 – Expenses

65. This provision expressly removes any power of the court to award legal expenses in an FAI. The effect of this section is unconnected with the payment of the expenses of witnesses etc. about which rules may be made in an act of sederunt under section 34(1).

66. The decision to hold an FAI is taken by the Lord Advocate acting in the public interest. The rule making power in the Bill will permit rules to be made to give sheriffs sufficient case management powers to be able to deal with vexatious behaviour as it arises without the need to award expenses. For example, FAI rules will greatly empower the sheriff to control proceedings through the use of minutes of agreed evidence, powers to regulate the conduct and management of proceedings and the regulation of witnesses and evidence.
Findings and recommendations

Section 25 – The sheriff’s determination

67. Section 25 provides for the determination made by the sheriff at the end of an FAI. Subsection (1) modernises what is currently set out in section 6(1) of the 1976 Act as recommended by Lord Cullen. The sheriff must make findings in relation to the circumstances of the death as set out in subsection (2), and has discretion as he or she considers appropriate, whether to make recommendations about steps which might realistically prevent deaths in similar circumstances in the future (as set out in subsection (4)).

68. Subsection (2) specifies the circumstances of the death or facts which must be set out in the determination, i.e. it looks back at what happened in the particular case. Subsection (2)(a) to (d) replicates section 6(1)(a) and (b) of the 1976 Act.

69. Subsection (2)(e) requires the determination to set out any precautions which were not taken before the death which is the subject of the FAI, but that could reasonably have been taken and might realistically have prevented the death. The precautions that the sheriff identifies at this point relate to the death which is the subject of the FAI and might not be the same as those recommended to prevent other deaths in the future under subsection (4)(a). In subsection (2)(e)(i), “reasonably” relates to the reasonableness of taking the precautions rather than the foreseeability of the death or accident. A precaution might realistically have prevented a death if there is a real or likely possibility, rather than a remote chance, that it might have so done.

70. Subsection (2)(f) is based on section 6(1)(d) in the 1976 Act. It allows the sheriff to make findings about any defects in a system of working which contributed to the death or an accident resulting in the death.

71. Subsection (2)(g) allows the sheriff to make findings about any other facts which are relevant to the circumstances of the death.

72. Subsection (3) provides that, for the purpose of identifying precautions that might have been taken, it does not matter whether it was foreseeable before the death or accident that the death or accident might occur if the precautions were not taken. Subsection (3) also provides that it does not matter, for the purpose of identifying defects in a system of working, whether or not if it was foreseeable that the death or accident might have occurred as a result of those defects. This makes it clear that the sheriff may employ hindsight when considering these findings, and further distinguishes an FAI from civil litigation.

73. Subsection (4) sets out the matters about which the sheriff may make recommendations, i.e. it looks forward to the prevention of similar deaths in the future. These matters are the taking of reasonable precautions, the making of improvements to, or introduction of, a system of working, or the taking of any other steps that might realistically prevent future deaths in similar circumstances. Again, there must be a real or likely possibility that the matters recommended may prevent other deaths in similar circumstances, rather than a remote chance that a similar death in the future might be prevented.
74. Subsection (5) allows the sheriff to address a recommendation to a participant or a body or office-holder with an interest in the prevention of deaths in similar circumstances to those in which the death occurred.

75. Subsection (6) provides that an FAI determination is inadmissible in evidence and cannot be founded on in other judicial proceedings. This reproduces the effect of section 6(3) of the 1976 Act. 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.

Section 26 - Dissemination of the sheriff’s determination

76. Section 26 confers duties on SCTS to publish and disseminate an FAI determination once it has been made by the sheriff.

77. Subsection (1)(a) requires the SCTS to publish all FAI determinations in such manner as it considers appropriate, but it is expected that this will be done by posting on the SCTS website. Subsection (1)(b) requires SCTS to issue a copy of the determination to the Lord Advocate, participants at the FAI, any person to whom a recommendation has been addressed and anyone else who may have an interest in any recommendation made.

78. Subsections (2) and (3) replicate the effect sections 6(4)(a) and (5) of the 1976 Act respectively. Subsection (2) obliges SCTS on request to send to the people and bodies listed there: a copy of the determination, the notice given by the procurator fiscal which initiated the FAI, any transcript of the evidence which was taken and any report or documentary production used in the FAI. Subsection (3) obliges SCTS to give to any other person, if requested and on payment of a fee to be set out in the FAI rules, a copy of the determination, or, if the person has an interest in the inquiry and makes the request within a timeframe set out in rules, any transcript of the evidence at the inquiry.

79. There may, however, be cases where persons should not receive all the details (for example cases involving children where identities may be irrelevant to the recipients). Subsection (5) provides that the sheriff may decide that part of the determination should not be published or should not be given to a person. It is expected that the determination will be treated in the same way as any other sensitive court judgement. The subsection gives the sheriff flexibility to redact where he or she thinks fit and in line with SCTS policy, but only in accordance with provision made in the FAI rules.

80. Subsection (6) provides that the procurator fiscal must, after the determination has been issued, advise the Registrar General of Births, Deaths and Marriages for Scotland of the date, place and cause death and the deceased’s name and last known address. This replicates the effect of section 6(4)(b) of the 1976 Act.
Section 27 – Compliance with sheriff’s recommendations

81. Subsection (1) obliges a person to whom a sheriff has made a recommendation to provide SCTS with a written response to that recommendation if he or she was a participant in the inquiry. In any other case, the person may choose to respond.

82. Under subsection (2) the respondent must state—
   • what the respondent has done or proposes to do in response to the sheriff’s recommendation; or
   • if the respondent has not done and does not intend to do anything in response to the recommendation, their reasons for that.

83. Under subsection (3), the respondent should reply within eight weeks of receipt of a copy of the determination. If the person does not respond to the determination with that period, there will be no sanction as such – the incentive for parties to respond would be that a lack of response or lack of good reasons for not implementing the recommendation would become public knowledge, thus promoting accountability and transparency. A person responding will have the opportunity to make representations to SCTS that part of the response should be withheld (subsection (4)).

84. SCTS will publish the response alongside the original determination, subject to such redaction as considered appropriate taking into account any representations from the respondent and any other reason (such as data protection law). If no response is received, SCTS will publish a note to that effect alongside the original determination (subsection (5)(b)).

Further inquiry proceedings

Section 28 – Circumstances in which there may be further proceedings

85. Section 28 makes provision for the circumstances in which there may be further proceedings under the Bill in relation to a death. This is a new power conferred on the Lord Advocate, which was not provided for in the 1976 Act.

86. Subsection (1) provides that, after an inquiry has ended, there may only be further inquiry proceedings in accordance with subsection (2).

87. Subsection (2) sets out the test for holding further FAI proceedings. The Lord Advocate may decide that there are to be further proceedings if there is new evidence in relation to the circumstances of the death, and the Lord Advocate considers that it is highly likely that any of the sheriff’s findings and/or recommendations would have been materially different if the new evidence had been available at the original FAI (rather than the determination as a whole being materially different), and the Lord Advocate decides that it is in the public interest for further proceedings to be held.

88. The definition of “new evidence” in subsection (3) is based on section 4(7)(b) of the Double Jeopardy (Scotland) Act 2011. It means evidence which was not available, and could not reasonably have been made available, at the original inquiry into the death.
89. Further inquiry proceedings can take one of two forms, either the re-opening and continuation of the original inquiry, or a completely new (fresh) inquiry being held into a death which was the subject of the original inquiry. The making of a determination by the sheriff is treated as the end of the original FAI in subsection (4). The sheriff will decide if further proceedings should be in the form of re-opening the original FAI or in the form of holding a fresh FAI (see section 30).

Section 29 – Precognition of witnesses

90. Section 29 allows the procurator fiscal to cite witnesses for precognition prior to any further proceedings. It is based on section 9 of the Bill and, if a person fails to comply when cited, the person is subject to the same level of sanction.

Section 30 – Initiating further proceedings

91. Section 30(1) requires the procurator fiscal to notify the sheriff that there are to be further proceedings in relation to the death and to provide a copy of the original determination as well as a brief account of the new evidence which has come to light. The sheriff to be notified is a sheriff of the sheriffdom within which the original proceedings were held (section 29(8)). Under subsection (2), the sheriff must set aside the determination made at the original inquiry and decide whether there is to be a fresh FAI or whether the original FAI is to be re-opened, and then make an appropriate order. This is not a matter for the Lord Advocate, nor is the location of the fresh or re-opened FAI.

92. Irrespective of whether the sheriff decides to re-open or hold a fresh FAI, the whole determination in the original proceedings must be set aside under subsection (2)(a). This is because, even if the only change to a determination is to record the new evidence led at a re-opened FAI, there will be another determination at the end of the further proceedings.

Section 31 – Re-opened inquiries

93. Subsection (1) applies sections 14 to 17 of the Bill (which provide for pre-inquiry procedure) to a re-opened inquiry in the same way as to the original inquiry. Subsections (2) to (4) modify the application of those sections to take into account that this is a re-opening of the original inquiry. Accordingly, as the procurator fiscal has already notified the sheriff that there are to be further proceedings, the notification procedure on the procurator fiscal in section 14(1) is dis-applied by subsection (2). This subsection also provides that the sheriff is to make an order under section 14(2) at the same time as he or she makes the order under section 30(2). An order under section 14(2) is one fixing a date and place for the holding of a preliminary hearing and the inquiry.

94. Subsection (3) requires notice of the re-opened inquiry under section 16 to be given to the participants at the original FAI and persons to whom recommendations were originally addressed.

95. Subsection (4)(b) requires notice to include the nature of the new evidence which was provided to the sheriff by the procurator fiscal. The purpose of this is to focus the minds of participants as to why the FAI has been re-opened and help them to prepare the relevant submissions and evidence they may wish to lead and any relevant background evidence which was led at the original FAI and which is required in order to set the context of the new evidence.
96. Subsection (5) restricts the evidence that is to be led to evidence about the matters to which the new evidence relates. However subsection (6) permits any evidence to be led if the sheriff either requires or allows it to be led. Taken together, the intention is that there is to be strong presumption that the re-opened inquiry will consider only those matters related to the new evidence. However, there is a recognition that it may not be foreseeable where that new evidence will lead, permitting the sheriff to widen the scope of the inquiry as required.

97. As a continuation of the original proceedings, the re-opened inquiry is to be held in the same sheriffdom as the original proceedings (but may be transferred by the sheriff to a different sheriffdom under section 12(3)).

Section 32 – Fresh inquiries

98. Section 32 makes provision about fresh inquiries.

99. Subsection (2) requires the sheriff to make an order under section 14(2) (fixing the date and place for the holding of a preliminary hearing and the inquiry) at the same time as making the order requiring it to be held.

100. Subsection (3) requires the procurator fiscal to notify all participants in the original FAI about the fresh FAI.

101. Subsections (4) and (5) provide that the fresh inquiry is to be held in the same sheriffdom as the original inquiry, unless transferred by the sheriff to a different sheriffdom under section 12(3).

Section 33 – Further proceedings: compliance with recommendations

102. Under section 30(2)(a), a sheriff will set aside the original determination made after the original proceedings. The sheriff will therefore issue a new determination at the conclusion of a re-opened or fresh FAI even if the only change to the original determination is to record the new evidence led at that FAI. Section 33(2) makes provision about the application of section 27 (compliance with the sheriff’s recommendations) where there is a new determination.

103. Under subsection (2), the requirement on a participant to respond to a sheriff’s recommendation under section 27 will not apply anew if the recommendation is the same as that already made in the original determination from the original FAI. This removal of a requirement to respond again to the same point does not affect any published response or published note of a lack of response made by SCTS in relation to the original FAI.

104. Under subsections (3) and (4), if a recommendation was addressed to a person in the original determination, but that recommendation is not made again in the new determination, the SCTS will be obliged to withdraw from publication any response made to the recommendation or any notice that no response has been given.
Inquiry procedure rules

Section 34 – Power to regulate procedure etc.

105. Section 34 gives the Court of Session a broad power to make acts of sederunt concerning the procedure and practice to be followed in FAI proceedings.

106. 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 FAI proceedings, the forms of documents used, and action to be taken before the FAI 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 FAIs.

107. 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.

Specialist sheriffs and summary sheriffs

Section 35 – Judicial specialisation in inquiries

108. Section 35 makes provision for sheriffs, part-time sheriffs, summary sheriffs and part-time summary sheriffs to be designated as specialist sheriffs in FAIs. Subsection (1) allows the sheriff principal to designate sheriffs and summary sheriffs within the sheriffdom, with section (3) allowing the Lord President of the Court of Session to designate part-time sheriffs and part-time summary sheriffs, who are not assigned to any particular sheriffdom, as specialists.

109. Subsection (5) makes it clear that it is still competent for a sheriff, part-time sheriff, summary sheriff, or part-time summary sheriff who is not designated as a specialist in FAIs to conduct an FAI. This may be inevitable owing to pressure of other casework. Under subsection (7), however, the sheriff principal must have to have regard to the desirability of allocating an FAI to a specialist.

Section 36 – Summary sheriff: competence to conduct inquiries

110. Section 36 gives summary sheriffs the same competence as sheriffs to conduct FAIs.

Section 37 – Repeal and modification of enactments

111. Section 37(1) repeals the 1976 Act in consequence of its re-enactment in the form of the Bill. For the most part the 1976 Act only extends to Scots law, however section 4(4) and (5) which are the precursor provisions for section 21 (publishing restrictions) extend to the law of England and Wales and Northern Ireland. The Scottish Government proposes that the full repeal of these provisions be progressed via the Order under section 104 of the Scotland Act 1998, as a natural consequence of extending the effect of section 21 to those jurisdictions. Section 37(2) introduces schedule 2 which is more fully described below. Insofar as any of the repeal modifies
the law on reserved matters this in the context of repealing provisions which are spent as a consequence of restatement in the Bill

General

Section 38 – Interpretation

112. Section 38 sets out the definitions that apply throughout the Bill unless the context requires otherwise.

Schedule 1 – Procedure rules

Role of the Scottish Civil Justice Council

113. Paragraph 1 of schedule 1 amends the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013, bringing the practice and procedure of FAIs and the making of FAI rules under the ambit of the Scottish Civil Justice Council.

Transitional arrangements

114. 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 FAI rules until such time as the provisions conferring responsibility on the Scottish Civil Justice Council and the Court of Session for the making of FAI rules are commenced. 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 – Modification of enactments

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

116. As mentioned, 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. The Scottish Government proposes that the full repeal of the provisions be progressed via the Order under section 104 of the Scotland Act 1998.
FINANCIAL MEMORANDUM

INTRODUCTION

1. This document relates to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 19 March 2015. It has been prepared by the Scottish Government 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 takes forward many of the recommendations made by Lord Cullen in his 2009 Review of the Fatal Accident Inquiry (FAI) Legislation that require primary legislation. Some of Lord Cullen’s recommendations were addressed to the Crown Office and Procurator Fiscal Service (COPFS) and have already been implemented, principally by the establishment of the Scottish Fatalities Investigation Unit. That Unit now oversees death investigations across Scotland and provides advice, support and expertise to procurators fiscal in order to ensure that policy and practice in the investigation of deaths is applied consistently.

4. The Bill provides an enabling framework and many of the detailed changes will be delivered through secondary legislation as FAI Rules. The Bill will repeal and re-enact the current legislation on FAIs to bring this area of law up-to-date.

5. The Scottish Government carried out a public consultation in the summer of 2014 on the proposals to implement Lord Cullen’s recommendations and other measures to modernise the FAI system. The consultation provided organisations and individuals the opportunity to comment on the potential impacts of the proposals. Further details of the consultation can be found in the Policy Memorandum.

6. The Financial Memorandum gives an overview of the impact on the Scottish Government, COPFS, Scottish Court and Tribunal Service (SCTS), and the other affected bodies as a result of the provisions in the Bill. However, many of the provisions will have no impact or financial element as they are a restatement (in modern drafting style) of the current provisions.

7. The estimates of costs and impacts contained in this Memorandum are compiled from information provided by those bodies affected by the Bill. It is estimated that there will be some impacts as a result of the Bill, however at this stage they are expected to be limited. The figures provided are the best estimates available.

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1 Consultation paper: [http://www.scotland.gov.uk/Publications/2014/07/6772](http://www.scotland.gov.uk/Publications/2014/07/6772)
OVERVIEW

8. Currently the number of FAIs held each year are 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 1: Number of FAIs commenced each financial year

<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>Total</td>
<td>165</td>
<td>36</td>
<td>201</td>
</tr>
</tbody>
</table>

9. The existing costs of an FAI will not change as a result of the Bill. The Bill will not affect or change the long-standing common law duty of procurators fiscal to investigate sudden, suspicious or unexplained deaths in Scotland. 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 2: Estimated cost to COPFS and SCTS of preparing and conducting an FAI

<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&quot;</td>
<td>£9,494</td>
<td>£13,122</td>
<td>£94,701</td>
</tr>
<tr>
<td>SCTS&quot;</td>
<td>£2,000</td>
<td>£10,000</td>
<td>£90,000</td>
</tr>
<tr>
<td>Total</td>
<td>£11,494</td>
<td>£23,122</td>
<td>£184,701</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 workplace 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 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 outwith a sheriff court room. Details of the costs of using alternative accommodation are available at paragraph 58. The estimates for COPFS for the one-day FAI

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3 Figures as at 31/1/15
4 Includes administrative, precognition, Victim Information & Advice (VIA), legal, pathology and witness costs.
5 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.
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. Furthermore, no practical change is being made in the Bill to the law in relation to the categories that currently result in the most FAIs (work place accidents and deaths in prison). Therefore, it is not expected that any changes provided for by this Bill will have a substantial effect on the numbers of FAIs held each year. As noted later in this document, there may be an additional one or two FAIs per year due to the change in definition for mandatory categories of FAIs and also the addition of discretionary FAIs into deaths abroad.

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 3: COPFS expenditure and staff**

<table>
<thead>
<tr>
<th></th>
<th>2011/12</th>
<th>2012/13</th>
<th>2013/14</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total expenditure in £000s</td>
<td>£105,604</td>
<td>£104,456</td>
<td>£106,095</td>
</tr>
<tr>
<td>Death investigation expenditure in £000s</td>
<td>£4,153</td>
<td>£4,107</td>
<td>£4,172</td>
</tr>
<tr>
<td>Total permanently employed staff</td>
<td>1,526</td>
<td>1,436</td>
<td>1,379</td>
</tr>
<tr>
<td>Staff employed on death investigations</td>
<td>43</td>
<td>40</td>
<td>45</td>
</tr>
</tbody>
</table>

**BILL PROVISIONS**

14. There are very few provisions within the Bill which are expected to commit the Scottish Administration to additional spending.

15. The Bill will:

- amend the categories of death in which it is mandatory to hold a fatal accident inquiry to ensure that all deaths in police custody and deaths of children in secure accommodation are covered;
- permit FAIs at the discretion of the Lord Advocate into deaths of Scots abroad where the body is repatriated and where there is a realistic prospect that the inquiry will yield significant findings;
- build on recommendations implemented by the Crown Office to make the system more efficient;
- provide flexibility for the location and accommodation for FAIs; and
- place a requirement on those to whom sheriffs direct recommendations at the conclusion of the inquiry to respond to indicate what, if any, action they have taken.

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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.
COSTS ON THE SCOTTISH ADMINISTRATION

16. The Bill’s provisions are not expected to have cost implications for the Scottish Government. As part of the legislative provision to reform the FAI system, new FAI Rules will be required. The Rules will be made by the Scottish Ministers as a transitional arrangement before the rule-making power is conferred on the Court of Session, advised by the Scottish Civil Justice Council (SCJC).

17. There will be no new provisions for enforcement or sanction (e.g. sanction for not giving evidence) in the Bill or subsequent FAI Rules. This is an enabling Bill to provide the statutory framework to implement Lord Cullen’s recommendations, and to enable COPFS, SCTS and Lord President to make the system more efficient and provide appropriate flexibility. The provisions to make the FAI system more efficient are expected to have a positive impact on the implementing bodies and the public, although the impact is not measurable in financial savings.

18. The parts of the Scottish Administration 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 and there will be no additional cost for staff or administration within the current business profile.

19. Overall, looking at the provisions in the Bill there will be an additional cost to COPFS for investigating any deaths abroad each year. This is expected to be around 50 cases each year and COPFS estimate this will cost around £157,350.

20. As stated above there may also be up to an additional two FAIs each year due to the provisions in the Bill. It is impossible to predict the expected length of any additional FAI, however, based on a mid-length FAI then this would cost an estimated £26,000 to COPFS and £20,000 to SCTS (based on the averages set out in Table 2).

COSTS ON LOCAL AUTHORITIES

21. 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 approved in accordance with regulations made under section 78(2) of the Public Services Reform (Scotland) Act 2010. 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, as set out in paragraphs 37-39.

22. The majority of local authorities which responded to the Government’s consultation indicated support for the above provision and the proposal for a response to sheriffs’ recommendations. Most local authorities stated that the proposal for sheriffs’ recommendations would not impact on them negatively based on their existing practices.
COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

23. Responses to the consultation and meetings with stakeholders indicate that the proposals will have only a minimal financial impact on organisations. The proposal regarding responding to sheriffs’ recommendations is supported by regulatory bodies such as the Health and Safety Executive and the Care Inspectorate which already react to recommendations they are aware of and note their decisions.

24. Business or consumer groups did not respond to the consultation despite being sent a notification. It is assumed that they consider that they will not be affected by the Bill. Some responses were received by insurance firms, but no concerns over financial impact were raised. A Business and Regulatory Impact Assessment (BRIA) is not necessary because changes in the Bill to the current system will not affect businesses except in the very exceptional circumstance that they may be obliged to respond to a sheriff’s recommendation. Any additional costs for public sector organisations will also only relate to responding to sheriffs’ recommendations.

Scottish Legal Aid Board

25. 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 for mandatory FAIs into deaths of children in secure accommodation and discretionary FAIs into deaths abroad, 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.

26. 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.

27. 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</td>
<td>33</td>
<td>38</td>
<td>16</td>
<td>10</td>
<td>18</td>
</tr>
<tr>
<td>applications for FAIs</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of legal aid</td>
<td>27</td>
<td>25</td>
<td>10</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>certificates paid for FAIs</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></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>

28. 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.

29. Based on an additional two FAIs each year due to provisions in this Bill it is impossible to predict whether those involved will require or be eligible for legal aid. Therefore, there may be a slight increase to the charge on the Legal Aid Fund as a result of the Bill but this will have no substantial effect to the general variation of FAI costs across the years.

NHS Scotland

30. 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. The provisions of the Bill will not affect the number or length of such medical inquiries. It is essential that, if the circumstances of a death have caused serious public concern, there should be a proper and thorough investigation. There should be no additional costs for NHS Scotland as a result of the Bill. There may be some administrative and legal costs incurred in responding to recommendations, 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

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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
own legal representatives and the response to a recommendation addressed to such a body will be dealt with by those legal representatives. Therefore, any additional cost as a result of this Bill relates only to the drafting and issuing of a written response, which will not be substantial.

BILL PROVISIONS: CATEGORIES OF INQUIRIES

Existing mandatory categories

31. FAIs are currently mandatory for deaths that occur as a result of an accident in the course of employment or which occur in legal custody. It is not proposed to change the existing mandatory categories.

Costs on the Scottish Administration

32. These categories will be re-enacted and, therefore, there will be no financial impact on the Scottish Administration or those involved in FAIs.

Deaths when under police arrest or detention

33. The Bill implements Lord Cullen’s recommendation to make FAIs mandatory for deaths in all types of legal custody irrespective of the place of death. It offers the same level of protection for everyone under police care and legal custody. In requiring a mandatory FAI for deaths of people under police arrest irrespective of the location, the Bill provisions clarify the circumstances in which a mandatory FAI should be held for a death in police custody.

Costs on the Scottish Administration

34. COPFS interprets the term “detention” in section 1(4) of the Fatal Accidents and Sudden Deaths (Scotland) Act 1976 in the plain English usage and does not differentiate between a person “detained” in terms of a statutory provision or under “arrest”. The key question is whether the person’s liberty is deprived at the point of "detention" — all such inquiries are held in terms of section 1(1)(a)(ii) of the 1976 Act. As a mandatory FAI would be held for any death during police arrest under the existing legislation, 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.

Costs on other bodies, individuals and businesses

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

36. 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.
Deaths of children in secure accommodation

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

Costs on the Scottish Administration

38. 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. It is, therefore, thought that having this as a mandatory category could result in no more than an additional one or two FAIs every few years. Given the minimal numbers, these additional FAIs are expected to be managed as part of the natural flux of death investigations and FAIs.

Costs on local authorities

39. Given the small numbers, it is not anticipated that this proposal will have a significant impact on local authorities. Even if it results in one additional FAI per year, which would be unlikely given the figure 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.

Discretionary FAIs

40. The provision in the 1976 Act for the Lord Advocate to hold a discretionary FAI will be re-enacted in the Bill so that a discretionary FAI can be held when:

- the death was sudden, suspicious or unexplained, or it occurred in circumstances which would give rise to serious public concern; and
- it appears to the Lord Advocate to be in the public interest that a FAI be held.

41. If the Lord Advocate decides against holding a discretionary inquiry, the Lord Advocate will have to provide reasons in writing to the bereaved family if requested so to do. This simply reflects existing COPFS practice. COPFS also writes to bereaved families, if requested to do so, in order to explain why an FAI is not to be held if a death falls within one of the mandatory categories, but the Lord Advocate takes the view that the circumstances of the death have been sufficiently established in other proceedings such as a criminal trial.

Investigations and inquiries into deaths abroad

42. Lord Cullen recommended that the Lord Advocate should have discretion to hold an FAI into the death abroad of a person ordinarily resident in Scotland whose body has been repatriated to Scotland. The provision will largely bring Scottish legislation in line with that in England and Wales where an inquest must be held into the death of everybody repatriated to a coroner’s area where the cause of death is unnatural, violent, or unknown.
43. Lord Cullen indicated that he thought that this power would be used very rarely out of respect for the investigating authority in the country concerned. There is, moreover, no intention that COPFS or Police Scotland should travel to the country where the death took place to conduct investigations. Rather, investigations will be conducted in the same way as is done by coroners in England and Wales.

System of Coroner’s Inquests in England and Wales

44. Since the decision of the Court of Appeal in 1983 in R v West Yorkshire Coroner, ex parte Smith [1983] QB 335 (the case of Helen Smith), coroners in England and Wales must hold an inquest into a death overseas if the body is returned to the coroner’s district and the circumstances are such that an inquest would have been held if the death had occurred in England and Wales.

45. As the provision in Scotland will be discretionary rather than mandatory, it will be less costly to implement than in England and Wales. Unlike the provision in the Bill, coroners must investigate a death irrespective of whether the deceased was a British national and/or was ordinarily resident in England and Wales. For illustrative purposes, the cost of such an inquest is estimated to be less than £3,400, based on a post-mortem costing in the region of £300, translation costs of up to £3,000, and the cost of reports from foreign jurisdictions.

46. Around 6,000 Britons die abroad each year. However, the vast majority of these will be expatriates and not those ordinarily resident in the United Kingdom. There are no accurate statistics available on the number of bodies repatriated to the UK as they do not have to be registered. The Foreign and Commonwealth Office (FCO) is not informed of every death.

Repatriations to Scotland

47. There are currently no accurate statistics kept on deaths of domiciled Scots abroad as there is no requirement to report them to the procurator fiscal or to register the death with the National Records of Scotland (NRS). NRS has a record of only 25 deaths of domiciled Scots abroad in 2013 but the figure is likely to be higher. The number of bodies repatriated to Scotland each year to be cremated is approximately 100. Figures are not readily available for the numbers of bodies repatriated for burial as they do not have to be registered with the authorities. However, there are likely to be at least the same number per year as for cremations. There is no way of working out which of these people were domiciled Scots to estimate the number of potential investigations and FAIs as a result of this provision.

Costs on the Scottish Administration

48. Of the cases of domiciled Scots deaths abroad where the body is repatriated to Scotland, the overwhelming majority will be natural cause or expected deaths with no unexplained circumstances and very few may require further investigation. For those that do, the investigation will be akin to a liaison exercise rather than a full detailed investigation due to the lack of powers to cite witnesses or obtain documents from abroad. Put into context, of approximately 11,000 deaths reported to COPFS, there are only around 50-60 FAIs held per annum. It is, therefore, reasonable to expect very limited additional inquiries as a result of this provision.
49. There will be no power for COPFS to cite witnesses from abroad, therefore any inquiry will be based on documentary evidence provided, as is the case for coroners’ inquests. Correspondence (the cost of which is in table 5 below) is expected even when no investigation or FAI will take place as the families will have questions and expectations as a result of the provision being available. Therefore, it will be important to manage the expectations of bereaved families to mitigate the impact of unnecessary correspondence.

50. In Scotland, there are not expected to be additional post-mortem costs as: (a) pathologists’ costs are provided in terms of contractual arrangements rather than being fee-paid for each post mortem in Scotland, and (b) they cannot be carried out if the body has been embalmed as is usually the case when a body is prepared for repatriation. Post mortem reports from the foreign authorities can be used instead.

Table 5: estimated potential costs for investigating deaths abroad

<table>
<thead>
<tr>
<th>Translation costs</th>
<th>£1,207</th>
</tr>
</thead>
<tbody>
<tr>
<td>Staff costs - Liaison with nearest relatives and general correspondence</td>
<td>£440</td>
</tr>
<tr>
<td>Staff costs – Liaison with authorities in foreign jurisdiction</td>
<td>£1,500</td>
</tr>
<tr>
<td>Total cost</td>
<td>£3,147</td>
</tr>
</tbody>
</table>

51. 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.

52. For coroners’ inquests in England and Wales, the FCO seeks documentation from the local competent legal authorities and then provides this to the coroner’s office for investigation. If the same arrangement can be made, which is a reasonable assumption given that FCO already supports Scottish residents abroad as British nationals and their relatives if there is an accident or death, then this will result in less costs for COPFS directly. As FCO already provides consular support for the deaths of Scots abroad that it is aware of, this should not result in a significant increase in its costs. Furthermore, documents, such as a death certificate and any post-mortem and toxicology report, should be provided with the body as part of repatriation. Therefore, it is likely to be police reports and witness statements that will be sought for investigation and any potential FAI.

53. It is difficult to predict how many deaths abroad will be reported to COPFS and could require investigation each year. If a burial or cremation has taken place abroad, or a body is not found, then this would not require investigation for an FAI. Based on estimates of bodies repatriated to Scotland being around 200 per year, the number requiring investigation will be much less as not all of the deceased will be ordinarily resident in Scotland. COPFS has estimated that there are likely to be no more than 50 investigations of deaths abroad each year at a total cost of approximately £157,350, which takes account of the fact that some of the liaison
These documents relate to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (SP Bill 63) as introduced in the Scottish Parliament on 19 March 2015

should be done by FCO. Based on this level of investigations, COPFS estimates that there will be no more than one FAI per year into a death abroad, which would only be held if it is in the public interest to do so according to specific criteria set out by the Bill. This is broadly in line with the number of FAIs held as a proportion of death investigations carried out by COPFS. The cost of an FAI into a death abroad should not cost any more than an FAI into a death that occurred in Scotland as the additional costs resulting from liaison and translation will be part of the investigation costs in table 5. Therefore, 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

54. 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.

INCREASING EFFICIENCY AND FLEXIBILITY FOR FAIS

Location of FAIs

55. An inquiry will be capable of being held in any place where there is a sheriff court and can be transferred from one court or sheriffdom to another. Other venues can also be used as currently happens for some longer running FAIs. This will allow greater flexible use of the existing court and tribunals estate as well as greater opportunity to use ad hoc non-court accommodation, which will support the efficient disposal of business and Lord Cullen’s recommendation that FAI should be held outwith a courtroom accommodation wherever possible. The provisions for jurisdiction and accommodation in the Bill do not require SCTS to hold FAIs outwith courts, but merely enables that option.

Costs on the Scottish Administration

56. It is anticipated that these enabling provisions will have a positive impact on SCTS as it will permit it to use any sheriff court or extend its practice of allocating an FAI to ad hoc premises. The main advantage will be to allow flexibility in programming and to reduce any delays in the allocation of dates for hearings. Arrangements for accommodation for FAIs is an operational matter for SCTS which is an independent, judicially led body. If it decides to extend the use of ad hoc non-court accommodation, the costs are set out below.

57. The SCTS has to date made use of ad hoc non-court premises in Glasgow, Motherwell and Aberdeen, which have already been configured to provide appropriate IT and accommodation for court use, allowing them to be used at relatively short notice (within six-eight weeks). The ongoing cost of setting up these premises is approximately £4000 per FAI depending on provision of services required. This does not include the cost of renting the premises. The cost of running an FAI in total, including rent and other costs in such ad hoc premises, can be significant, ranging between £100,000-150,000 (with a recent six-week inquiry costing over £112,000). The SCTS considers there are operational advantages to using such premises earmarked for the hearing of FAIs to support the overall management of the FAI and court programme but the cost of using these premises requires appropriate budget support.
58. The SCTS has a long-term vision for justice centres, dependent on the appropriate budget provision, and is looking initially at Fife, Lanarkshire and Inverness. Such centres will provide a full range of specialist support services which will complement the high quality courts which exist in many of Scotland’s cities and could include FAIs. The SCTS will work up feasibility studies into the three areas identified for justice centres. The SCTS believes that, with the relevant funding in place, justice centres can be progressed in the next three to five years. It is possible that bespoke accommodation for FAIs might be made available with such centres if they are set up.

Costs on other bodies, individuals and businesses

59. It is anticipated that the benefit of having the flexibility for FAIs to be held in any court or other appropriate accommodation will balance the potential inconvenience and cost of participants to an inquiry having to attend further away than expected or to change location if the inquiry is transferred. The choice of sheriffdom will be made by the Lord Advocate in consultation with SCTS, and the choice of court or non-court premises will be a decision for the sheriff principal. These choices will take into account the needs and location of the participants. The sheriff will determine if a case is to be transferred in consultation with the sheriff principal of the other sheriffdom. This will allow the efficient disposal of business with the needs of the bereaved families also being considered.

Preliminary hearings

60. The Bill provides for preliminary hearings to be held for every FAI, unless the sheriff decides to dispense with such a hearing, which follows the successful practice in Glasgow and Edinburgh. FAI Rules will govern that decision as well as the purpose of a preliminary hearing. The purpose of the preliminary hearing is to try to establish how much evidence needs to be heard at the FAI hearing itself and is thus intended to facilitate an estimate of how much court time will be required.

61. It is proposed that preliminary hearings may be held by conference call, video-link or in chambers, rather than having to convene a full court and the FAI Rules will allow for this.

Costs on the Scottish Administration

62. This provision will simply provide a statutory basis for what largely happens in practice in many areas allowing greater judicial case management at the discretion of the sheriff. Therefore, this provision will have no additional costs and will be met within existing resources of COPFS and SCTS.

Agreement of facts

63. The Bill makes it clear that agreed statements on matters which are uncontroversial can be submitted before the FAI hearing.
64. Joint statements of agreed facts are currently used in some FAIs and this provision merely clarifies and encourages their use.

65. Providing for agreement of facts may have a beneficial impact on the duration and, therefore, the costs of the FAI, though this is impossible to quantify. The Act will encourage the fiscal and each of the participants at the inquiry to take reasonable steps to reach agreement about any facts in relation to which the fiscal or participant intends to bring forward evidence and which the fiscal or as the case may be participant considers unlikely to be disputed by the other participants.

Benefits

66. 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.

SHERIFFS’ DETERMINATIONS

67. The proposal that parties to whom sheriffs make recommendations in their determinations should respond will encourage compliance and accountability and bring the system in relation to sheriffs’ recommendations more into line with what happens in relation to coroners’ reports in England and Wales. The greater dissemination of recommendations and public record of responses will hopefully lead to lessons being learned and deaths in similar circumstances being avoided in the future. A model for a similar scheme can be found in section 29 of the Coroners (Investigations) Regulations 2013.10

68. All sheriffs’ determinations at the conclusion of FAIs will be published on the SCTS website. At present some determinations which are thought to be of legal or other interest have been posted on the SCS website at the decision of the sheriff, so this proposal is merely an extension of existing practice. The most recent 50 determinations online are listed and all published determinations since 1999 are searchable. This provision will mean that all sheriffs’ recommendations will be available for the public and organisations to see and search online, providing a useful resource.

69. Sheriffs will have a power to disseminate determinations not only to participants of an FAI, but also to bodies which did not participate, such as regulatory bodies that can apply recommendations that are agreed. Sheriffs already send copies of their determinations to participants in an FAI. The proposal will hopefully lead to more transparency and lessons being learned from the circumstances of a death. This is a non-mandatory power for sheriffs to use at their own discretion.

10 The Coroners (Investigation) Regulations 2013:
70. It is proposed that parties to whom sheriffs’ recommendations are addressed will be obliged to respond to the SCTS indicating:
   - what steps the person has taken or proposes to take to comply with recommendations addressed to it; and
   - if there are any aspects of the recommendations which the person does not intend to comply with, their reasons for not complying with them.

71. Although those participants would not be obliged to comply with the sheriff’s recommendations, they would be obliged to explain the reasons why they have not complied if they do not intend to comply. Representations can also be made by the respondent to indicate why the response, or part of it, should not be published. A copy of the response will be published on the SCTS website with the original determination, or a note if no response has been received within eight weeks. There is to be no penalty should a person fail to respond. This provision will ensure there is a public record of any follow up action in response to sheriffs’ recommendations, which will increase transparency, compliance and accountability. This would be a proportionate and practical way of ensuring that sheriffs’ recommendations are considered by those to whom they are addressed.

**Costs on the Scottish Administration**

72. 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. In the year to 31 January 2015, 36 determinations were published by SCTS on the instruction of the presiding sheriff. This means that almost all FAI determinations are currently published. Any minor administrative costs in the duty to publish all FAI determinations can be managed by SCTS using existing resources as it is an extension of current practice. The cost of disseminating recommendations to other bodies is part of the overall cost of SCTS supporting the sheriff at an FAI, and is also an extension of existing practice, so can be managed. This is a power rather than a duty for the presiding sheriff and so no costs are being imposed as a result of this provision.

73. Receiving, checking and publishing responses is not expected to be too onerous given the low volume of determinations in which recommendations are made (fewer than 20 per year). More than one participant may have to respond. However, not all responses will require full legal examination to ensure they comply with data protection and defamation laws. The role will be similar to checking responses to consultations before publication. In England and Wales, the Chief Coroner’s Office simply removes names when redacting. That Office also informs that no responses received have contained defamatory material, so the likelihood in Scotland is very low, particularly given that many responses will come from public bodies. Allowing representations to be made will mean that participants can have a say in what should be published.

74. The Scottish Government and SCTS are developing the costs for this work. However, it is expected that these costs will not be significant. The cost of actual publication will be

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11 This is based on FAI determinations visible on the SCTS website at https://www.scotcourts.gov.uk/search-judgments/fatal-accident-inquiries
minimal as the IT provisions are already in place. The result of lessons being learned from sheriffs’ recommendations is a long-term benefit and purpose of the FAI system.

**Costs on local authorities**

75. Most local authorities and public bodies already have a review process in place to deal with recommendations. There may be some administrative and legal costs incurred in responding to recommendations but these were not specified in consultation responses. Regulatory bodies and local authorities that responded to the consultation supported this proposal and did not raise any concerns. Only one local authority indicated that there could be financial and policy considerations and no standard costs can be provided as they will depend on the nature and extent of the recommendations.

76. As there will be no penalty for non-compliance, the provision will not have a direct financial impact on bodies. Furthermore, only bodies that participated in the FAI will be obliged to respond, so responding to recommendations will become part of the overall costs of being involved in an FAI.

**FURTHER INQUIRY PROCEEDINGS**

77. Lord Cullen suggested that 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. 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 his or her original determination would be affected by the new evidence which has come to light.

78. 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**

79. COPFS will be responsible for preparing the evidence for any further inquiry proceedings; therefore, this provision will impact on them the most. The power will be at the Lord Advocate’s discretion and it will be a matter for COPFS to resource it appropriately.

80. 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.

81. 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.
JUDICIARY

Judicial specialisation

82. The Bill will allow for sheriffs principal to designate sheriffs as specialists in relation to FAIs and decide if an FAI should be allocated to a specialist sheriff.

Costs on the Scottish Administration

83. 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\(^\text{12}\), 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.

84. The JIS entirely endorses Lord Cullen’s recommendation 3 in respect of judicial training, namely that JIS should include the law and practice of FAIs in its seminars, and sheriffs should be encouraged to take advantage of attending them. JIS has confirmed that there has been a clear focus for such training in its programmes over the years. Furthermore, the JIS will continue to train in this important area and monitor developments with new legislation which will present more need and focus for this kind of specialist training.

Summary sheriffs

85. It is proposed that the new summary sheriffs introduced by the Courts Reform (Scotland) Act 2014\(^\text{13}\) will have competence to preside over FAIs. Under the 2014 Act, summary sheriffs will have jurisdiction to deal with summary criminal business and civil business not exceeding £5000 in value as well as some family cases and any other specialisations required, with the aim of having the right cases heard by the right level of judiciary. The establishment of a third tier of judiciary, summary sheriffs, to deal with such business means that sheriffs will be freed up to devote more time to more complex casework. This principle applies equally to FAIs as it does to civil and criminal business in the sheriff court.

Costs on the Scottish Administration

86. The use of summary sheriffs will have no cost implications for SCTS as it will be a redeployment of resources across sheriff court business.

FAI RULES

87. The Bill amends the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 to provide the Scottish Civil Justice Council (SCJC) with the power to propose rules of

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\(^\text{12}\) The Judicial Office is a separate part of the SCTS established to provide support to the Lord President in his role as head of the Scottish judiciary with responsibility for the training, welfare, deployment, guidance and conduct of judges and the efficient disposal of business in the courts.

procedure for public inquiries into certain deaths (referred to as Fatal Accident Inquiries or FAIs).

88. FAI Rules are currently made by the Scottish Ministers under rule-making powers in the 1976 Act as amended by subsequent secondary legislation. The SCJC will be unable to assume responsibility for FAI rule-making for some time as it will be concentrating on court reform following the enactment of the Courts Reform (Scotland) Act 2014.

Costs on the Scottish Administration

89. It is proposed that the SCJC will take on work on FAI Rules when it is ready so to do. Until that time, the Scottish Ministers would continue to make rules for FAIs, as is currently the practice. The new FAI Rules will be drafted in consultation with the Lord President, SCTS, COPFS and other appropriate persons. As FAI Rules will be written by the Scottish Ministers, it is not expected for there to be a substantial workload for the SCJC to undertake. Its role will mainly be to review the FAI Rules, which is estimated to commence in 2018.

90. The SCJC can 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

91. It is anticipated that COPFS will record FAI cases and maintain statistics so that there can be an assessment of the reforms.
SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

On 19 March 2015, the Cabinet Secretary for Justice (Michael Matheson MSP) made the following statement:

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

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PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 19 March 2015, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC. (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)