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*Am Convenor*

#### **Fatal Accident Inquiries (FAIs)**

Thank you for your letter of 9 September 2019 on behalf of the Justice Committee in which you ask a number of questions about Fatal Accident Inquiries (FAIs). In particular you have referred to the circumstances of Sheriff Liddle's determination into the death of Mr Marshall. I am grateful for the continuing interest of the Justice Committee in the work of the Service.

It may be useful if I provide some information about the particular case of Allan Marshall before addressing the specific questions which you have posed.

Mr Marshall died on 28 March 2015. Following his death, a criminal investigation was undertaken. That was reported to Crown Counsel, who concluded that there was insufficient evidence for criminal proceedings to be raised against the prison officers in respect of the circumstances surrounding the restraint. This decision was explained to the nearest relatives of the deceased.

The Procurator Fiscal thereafter conducted further enquiries into the circumstances of Mr Marshall's death, with a view to the mandatory the FAI which would follow. Those enquiries included matters which required to be addressed with expert witnesses – including medical and psychiatric issues, as well as further advice on restraint techniques. The Crown lodged a First Notice (the document prepared by the Procurator Fiscal which initiates the Fatal Accident Inquiry proceedings) with the Court in September 2017, with the first procedural hearing of the FAI being held in November 2017. Notwithstanding the issues which required to be addressed, I accept that the time which it took, in this case, for the death investigation to reach the lodging of a first notice was not satisfactory. As you will appreciate, the subsequent course and duration of the FAI proceedings, after the lodging of the First Notice in September 2017 is not in the hands of the Crown. The sheriff issued his determination in August 2019.



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During the FAI proceedings the Sheriff enquired of the Procurator Fiscal Depute, in terms of Section 20 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (the 2016 Act), what the Crown's position was in relation to criminal proceedings against the prison officers in respect of the circumstances surrounding the restraint. Section 20(5) of the Act makes it clear that giving evidence at an Inquiry does not prevent criminal proceedings being taken against that person.

Section 20(6) of the Act states:

"a person is not required at an Inquiry to answer a question tending to show that the person is guilty of an offence."

The Crown's decision that there would not be a prosecution against the officers in respect of the incident was communicated to the sheriff, and to the officers concerned. Had that not been done, the Sheriff would have had to warn all the officers involved of the terms of both Section 20 (5) and (6), and they would have been entitled to refuse to answer questions about the incident. The communication of the Crown's decision accordingly ensured that the FAI would have available to it all the relevant evidence, including the full evidence of the officers concerned.

As you will be aware, it is not the purpose of a FAI to attribute civil or criminal liability. In his determination Sheriff Liddle did not conclude that the criminal offence of assault was perpetrated by individual prison officers against Mr Marshall. Rather he detailed many and repeated instances of poor/inadequate restraint and failures on the part of officers to de-escalate the situation, to which he directed recommendations for learning towards SPS.

Against that background, I respond to the six specific questions which you ask.

1. Accepting that some cases are more complex than others, what steps are being taken to improve the time taken for FAIs in Scotland?

As the terms of the question recognise, the time taken to conclude evidence in a FAI, from the date of a person's death, will vary depending on the particular circumstances of the investigation into a person's death. As you observe some cases are more complex than others. The complexities may include technical and medical issues, which require the instruction of expert witnesses. In such cases, the duration of the investigation may be significantly affected by the availability of relevant experts and the demands on their time. The time taken can also be affected by the nature of the factual issues involved, and the complexity of investigating those factual issues. Further, in some cases, it is necessary to consider whether there ought to be any criminal proceedings before the death investigation proceeds with a view to a Fatal Accident Inquiry.





Where a FAI is held, the speed with which it proceeds to the conclusion of evidence, and, thereafter, to issue of the presiding Sheriff's determination depends on a variety of factors, including the scale and complexity of the inquiry and the other demands on court and judicial time.

The Crown Office and Procurator Fiscal Service (COPFS) is committed to the prompt investigation of deaths, but accepts that in some cases the time taken to complete a thorough investigation has been too long. In over 90% of the 9,000-11,000 deaths reported to COPFS in a year, the Procurator Fiscal completes the investigation and is able to close the case within 12 weeks.

However, in cases where the circumstances surrounding a death are particularly complex, a thorough investigation will take longer to complete. In some cases often those which involve the consideration of potential criminal proceedings or a Fatal Accident Inquiry - experience shows the timescale can be significantly longer. The Crown accepts that the duration of some investigations has been too long. It understands the impact which this can have on all those affected by the death, including, in particular, the bereaved family.

COPFS has, accordingly, applied part of the additional funding which has been provided to it by Scottish Government, to increase the resource available to the Scottish Fatalities Investigation Unit (SFIU), the specialist team within COPFS which investigates deaths and conducts FAIs, with a view to reducing the time required to complete complex death investigations and improving the provision of information to families and next of kin. Additional staff have been recruited to the Unit and are all now in place. In addition, COPFS has revised the way the progress of all death investigations is monitored to ensure that they are completed as efficiently as possible. These measures are being implemented through a modernisation programme. That programme was recognised by Her Majesty's Inspectorate of Prosecution in her recent follow up review of a thematic inspection of FAIs, in August 2019. Whilst the full impact of the additional staffing and the modernisation programme will take time to come through - not least because the Unit needs to address the backlog of cases whilst also dealing with new cases, I am confident that these changes will over time achieve a significant improvement in the service delivered by COPFS in this important area of work.

2. Are there sufficient resources available to be able to complete these FAIs in as short a period as possible whilst at the same time retaining the rigorous process that needs to be followed in each case?

The additional resource made available by the Scottish Government was based on a careful analysis of the changing caseload of COPFS and its resource needs if it is to deal with that changing caseload and to meet reasonable public expectations, including, specifically the expectation that it will reduce the duration of more complex death investigations. The Service will keep the performance, and the





resourcing, of SFIU under review, as the impact of the additional resource and the process changes to which I have referred start to be felt.

Please provide current data on the length of time taken on average for FAIs conducted this year and last year to begin and conclude.

In the last two financial years (1 April to 31 March - 2017-2018 and 2018-2019) the average length of time to conclude FAIs was 718 (2017-2018) and 868 (2018-2019) days. This is based on figures taken from the COPFS database, which is a live operational system and as such figures are subject to change as updates are applied. These figures are calculated by reference to the number of days between the date of death and date that the evidence was concluded for FAIs that completed evidence in these years. Please note that the date of completion of the FAI for the purposes of this exercise is the date when evidence in the FAI was concluded/submissions by interested parties delivered. The period between that date and the issue of the Sheriff's determination is not included.

### 3. What criteria is used to decide whether a prosecution is viable?

The criteria which are applied by prosecutors when deciding whether or not to bring a prosecution are set out in the Scottish Prosecution Code, a copy of which I attach.

### 4. In cases such as Mr. Marshall's, on what grounds and to whom would Crown Counsel decide to offer immunity from prosecution?

The question of whether or not an individual will be prosecuted is determined by applying the criteria in the Scottish Prosecution Code. In a case, such as the case involving Mr. Marshall, where a decision has already been made, on the application of those criteria, that a witness to a FAI will not be prosecuted, that decision may be communicated to the witness and, indeed, to the presiding sheriff. This is done with a view to ensuring that the witness can give full and candid evidence to the inquiry. If the Crown were not to communicate the decision (and thereby debar itself from prosecuting the witness), a witness at risk of prosecution would be entitled to refuse to answer questions, with a consequent loss of evidence to the inquiry. Communicating the decision, in such a case, serves the public interest in the inquiry having available to it all the relevant evidence.

In other cases, if an issue of potential criminality on the part of a witness were to arise for the first time during the preparation for or conduct of a fatal accident inquiry, a decision would require to be made as to whether or not the Crown should, at that stage, reserve or give up the right to prosecute the witness. That decision would be made by applying the criteria in the Scottish Prosecution Code. In exceptional cases, the value of having full evidence at a fatal accident inquiry might itself, at that stage, be a public interest consideration which would fall to be taken into account, along with all the other relevant



factors (e.g. the nature of the potential criminality; whether, for example, the potential charge was of a minor regulatory offence or a more serious offence). I should emphasise that this was not the position in relation to the Allan Marshall case, where a decision not to prosecute had already been made at an earlier stage, as a result of applying the criteria in the Scottish Prosecution Code.

5. How many occasions, in the last five years, has a decision to grant immunity from prosecution for individuals involved in FAIs been taken?

For the avoidance of doubt, the Crown does not "grant immunity from prosecution" in return for evidence at a FAI. The Crown makes prosecutorial decisions on the basis of the criteria set out in the Scottish Prosecution Code. A decision that a witness to a FAI will not be subject to prosecution may, as I have explained above, be communicated to the witness, and to the sheriff, with a view to serving the public interest in securing the fullest evidence before the inquiry. Such decisions are made as and when the issue arises. It would not be possible to identify the number of times this has happened in the last five years without reviewing every individual FAI which has taken place during that timespan.

I trust this information is helpful to the Justice Committee.

**W. JAMES WOLFFE QC**