

## SPICe Briefing

# Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill – Stage 3

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This briefing looks at consideration of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill at Stages 1 and 2. The Bill would reform the law governing the holding of Fatal Accident Inquiries (FAIs).

FAIs are judge-led inquiries into workplace and prison deaths, as well as deaths which are sudden, suspicious, unexplained or give rise to public concern.

The key issues which have emerged during consideration of the Bill prior to Stage 3 are:

- **The extent to which the categories of death requiring a mandatory FAI should be extended** – proposals to cover those detained under mental health legislation, looked-after children and victims of industrial diseases and exposure to hazardous substances have been put forward.
- **What role the family of the deceased should have in the process** – issues include:
  - how to improve Crown Office communication with the family,
  - whether family members should automatically be provided with written reasons for why a decision not to hold an FAI was reached, and
  - whether legal aid should be easier to access.
- **How best to deal with delays between a death and an FAI being held** - the Bill would introduce preliminary hearings. Statutory timelimits have also been proposed.
- **How to ensure that sheriffs' recommendations are implemented** – the Bill requires responses from those to whom recommendations are addressed to respond. The impact of making sheriffs' recommendations legally binding was also discussed.

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# INTRODUCTION

The [Inquiries into Fatal Accidents and Sudden Deaths \(Scotland\) Bill](#) is a Scottish Government Bill. It was introduced in the Scottish Parliament on 19 March 2015. Its purpose is to “reform and modernise the law governing the holding of fatal accident inquiries (FAIs) in Scotland” (Policy Memorandum, paragraph 2).

On 1 June 2015, Patricia Ferguson MSP introduced a Member’s Bill – the Inquiries into Deaths (Scotland) Bill – which covered much of the same ground as the Scottish Government Bill. The policy differences between the bills are discussed below.

Ms Ferguson withdrew her bill on 24 September 2015. She stated (Scottish Parliament 2015, col 60) she would continue to work with the Scottish Government to address several points of concern.

This briefing looks at parliamentary scrutiny of the Scottish Government’s Bill prior to Stage 3.

## BACKGROUND

### FATAL ACCIDENT INQUIRIES

FAIs are held to establish the circumstances surrounding certain deaths. They are presided over by sheriffs. The sheriff may make recommendations aimed at preventing future deaths in similar circumstances.

Under the current law, mandatory FAIs must be held where someone dies in legal custody, or in an accident related to their work.

An FAI can also be held where a death is sudden, suspicious, unexplained or gives rise to serious public concern. The Lord Advocate (through the Crown Office and Procurator Fiscal Service, or COPFS) has discretion to hold an FAI in these circumstances where he decides it is “expedient in the public interest”.

The Lord Advocate also has discretion not to hold an FAI (even a mandatory FAI) if the circumstances of the death have been adequately established in related criminal proceedings.

It is not possible to challenge the Lord Advocate’s decision not to hold an FAI by appealing. However, such decisions can be the subject of a judicial review. This looks at the procedural aspects of the decision-making process rather than the merits of the case.

Around 50 to 60 FAIs are held each year. COPFS carries out investigations into the circumstances of deaths in significantly more cases – approximately 5,500 each year.

### HUMAN RIGHTS CONSIDERATIONS

Article 2 of the European Convention on Human Rights creates a right to life. The European Court of Human Rights has interpreted this to include a duty on states to investigate loss of life in certain circumstances. There are procedural standards which such investigations must meet, but it is otherwise up to individual governments to decide how the right should be implemented.

In order to meet the procedural requirements laid down by the European Court of Human Rights, an investigation must:

- be independent

- be effective
- be reasonably prompt
- allow for sufficient public scrutiny,
- involve the next of kin to an appropriate extent, and
- be instigated by the state (rather than matters being left to the next of kin).

In its submission to the Justice Committee, the Scottish Human Rights Commission (2015) made the following observation (paragraph 5):

“In considering when the procedural obligation of Article 2 arises, there is a particular obligation to provide explanations for deaths in custody or detention, in recognition of the fact that people in custody are in a vulnerable position and the authorities are under a duty to protect them. The Court [of Human Rights] has also recognised that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with.”

## **THE CULLEN REVIEW**

Lord Cullen was asked by the Scottish Government to conduct a review into FAI legislation. The [review report](#) was published in 2009. Some administrative recommendations flowing from the review have already been implemented. However, many recommendations require primary legislation.

The Scottish Government Bill would implement, broadly, Lord Cullen’s recommendations. There were several recommendations which the Scottish Government did not accept. The rejected recommendations are discussed below. Amendments to the Bill at Stage 2 have resulted in partial provision for some of these.

### **Extending the mandatory categories of FAI**

Lord Cullen recommended that mandatory FAIs should be held in two additional circumstances. These were where a child living in a “residential establishment”<sup>1</sup> dies and where the deceased was subject to compulsory detention by a public authority at the time of death. The latter category would cover those detained under mental health legislation.

The Scottish Government’s Bill as introduced would extend mandatory FAIs to include children who die while living in “secure accommodation”. That is a residential establishment where a child’s liberty is restricted. Children are placed in secure accommodation as a result of a children’s hearing.

### **Holding early court hearings in relation to mandatory FAIs**

The purpose of such a hearing would be for the Procurator Fiscal to provide information about the progress of the investigation. It was intended to keep relatives informed and to focus attention on ensuring the FAI was held as quickly as possible. Lord Cullen envisaged that it would take place within three months of the death.

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<sup>1</sup> The term “residential establishment” is used to describe live-in accommodation for children and young people. It may be provided by a local authority or third party. Children may be in a residential establishment because there is no one to care for them at home or because they have complex disabilities.

## Legal aid

Lord Cullen recommended that the relatives of the deceased should be able to qualify to receive legal aid to pay for participation at an FAI without meeting the usual tests. He recommended that they should not have to demonstrate that it was “reasonable” in the circumstances for legal aid to be granted. He also suggested that the financial eligibility criteria should be relaxed.

## Publication of responses to sheriffs’ recommendations

Lord Cullen recommended that responses from those to whom a sheriff directed recommendations should be published on the Scottish Government’s website and in an annual report to the Scottish Parliament.

## PATRICIA FERGUSON’S BILL

Ms Ferguson’s Inquiries into Deaths (Scotland) Bill would also have implemented the majority of Cullen Review recommendations. However, it went further than both Lord Cullen and the Scottish Government in several respects. These included:

- extending the mandatory categories of death inquiries to cover work-related deaths from industrial diseases and exposure to hazardous substances, as well as some other categories,
- requiring the Lord Advocate to give inquiry participants written reasons for a number of decisions, including the decision not to hold an inquiry<sup>2</sup>,
- creating time limits for the Lord Advocate to apply for death inquiries, with the intention of speeding up the process,
- increasing the impact of sheriffs’ recommendations, including making them legally binding in certain circumstances, and
- clarifying the role of death inquiries in preventing future deaths.

The Justice Committee was the lead committee for Stage 1 consideration of Patricia Ferguson’s Bill. It published a [Stage 1 Report](#) on 4 September 2015 (Scottish Parliament Justice Committee 2015a). The Justice Committee’s Stage 1 Report on the Scottish Government Bill is discussed below.

As noted above, Patricia Ferguson has withdrawn her bill.

## FAMILY LIAISON CHARTER

During her evidence to the Justice Committee at Stage 1, the Solicitor General stated that COPFS would produce a family liaison charter (Scottish Parliament Justice Committee 2015b, col 20). This was referred to at the time as a “milestone charter”.

The purpose of the charter is to set out clear stages and timescales for communications between COPFS and bereaved relatives. It is intended to ensure that families are kept abreast of developments and understand the reasons for any delays in holding an inquiry.

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<sup>2</sup> The Scottish Government Bill would require the Lord Advocate to give written reasons for the decision not to hold an FAI on request.

The Justice Committee discussed the proposed family liaison charter in its Stage 1 report (Scottish Parliament Justice Committee 2015c, in particular paragraph 144). It believed the charter adequately addressed the needs identified by Lord Cullen as underlying his recommendation to hold early hearings.

An amendment at Stage 2 would put the family liaison charter on a statutory footing.

## SUMMARY OF PROPOSALS IN THE BILL

The main areas where the Scottish Government Bill would reform the law are as follows:

- **Mandatory FAIs** – The Bill would update the definition of legal custody to include any death while detained by the police and would require a mandatory FAI where a child dies while living in secure accommodation.
- **Discretionary FAIs** – The Bill would enable a discretionary FAI to be held where a Scottish resident dies outside the UK.
- **Role of the Family** – The Bill would require the Lord Advocate to give written reasons for a decision not to hold an FAI, in most circumstances. It is intended that this will make the basis of the decision clearer to the deceased's relatives.
- **Delay** – The Bill would introduce a requirement to hold a preliminary hearing in advance of an FAI, as well as encouraging the sharing and agreeing of evidence in advance. This is expected to speed up the process of holding an FAI.
- **Sheriffs' recommendations** – The Bill would create an obligation on the party to which a sheriff's recommendation was addressed to respond. The Scottish Courts and Tribunals Service would be required to publish responses.
- **Other matters** – The Bill would: introduce more freedom in choice of location and venue for an FAI; allow FAIs to be re-opened or reconvened; and enable sheriffs and summary sheriffs to be designated as specialists.

## PARLIAMENTARY CONSIDERATION

### STAGE 1

The Justice Committee was responsible for Stage 1 scrutiny of the Bill. At Stage 1, a committee is required to consider and report on the general principles of the Bill.

The Justice Committee issued a call for evidence and received a number of written responses. Further information is available from the [Justice Committee's webpages](#). The Justice Committee also heard oral evidence on the following dates: [5 May 2015](#), [12 May 2015](#), [19 May 2015](#) and [26 May 2015](#).

The Justice Committee published its [Stage 1 Report](#) (Scottish Parliament Justice Committee 2015c) on 1 July 2015. The Scottish Government [responded](#) (Wheelhouse, P. 2015) on 17 September 2015.

The Stage 1 debate took place on [24 September 2015](#). The Minister for Community Safety and Legal Affairs set out the Scottish Government's intention to amend the Bill to remove the requirement for a body to be repatriated if an FAI into a death abroad was to be held. He also

noted that the Scottish Government was willing to work with Patricia Ferguson to ensure the family liaison charter proposed by the Solicitor General was put on a statutory footing.

The Minister outlined work between the Scottish Government and the UK Government to enable mandatory FAIs to be held where service personnel die in Scotland in the course of their duties. This matter is reserved. It would be taken forward by way of a Section 104 Order under the Scotland Act 1998 if the Bill was passed.

There was general support for the Bill from MSPs because it modernised the law in this area. In particular, contributors welcomed: the removal of the requirement to repatriate a body before an FAI could be held; the improved position for service personnel; and the intention of COPFS to produce a family liaison charter which would set standards and timescales for communication with bereaved family members.

Members also raised concerns about matters which they believed were not adequately addressed in the Bill. These included: improving the processes for ensuring compliance with sheriffs' recommendations; inquiring into the deaths of those detained under mental health legislation and looked-after children, as well as in health settings more generally; making legal aid more accessible to families participating in an FAI; and ensuring adequate resources were available for COPFS to perform its functions effectively.

Members also emphasised the important role that bereaved families play in the FAI process. Several contributors argued that families' need for justice was not met by the current system and alternatives needed to be considered. There was general agreement that improvements to families' understanding of the FAI process, and to the way COPFS communicated with them, were key.

## **STAGE 2**

The Justice Committee was responsible for considering the Bill at Stage 2. It debated amendments at its meeting on [3 November 2015](#).

The [Bill as amended at Stage 2](#) was published on 4 November 2015.

## **KEY ISSUES AT STAGES 1 AND 2**

The table below (Table 1: Key issues at Stage 1 and Stage 2) outlines the key issues raised during parliamentary scrutiny of the Bill so far. It includes consideration of the Justice Committee's Stage 1 recommendations, the Scottish Government response and whether the matter was addressed at Stage 2. It is intended to provide a summary of the main issues associated with the Bill. It is not a comprehensive discussion of all the issues raised.



**Table 1: key issues at Stage 1 and Stage 2**

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
<b>Extension of mandatory categories of FAI</b>		
<p>Lord Cullen recommended that mandatory FAIs be extended to cover the deaths of children in residential accommodation as well as those under compulsory detention by a public authority at the time of death. Some of those giving evidence to the Justice Committee raised particular concerns about those detained under mental health legislation and looked-after children.</p>	<p>The Stage 1 Report asked the Scottish Government to consider whether mandatory FAIs should cover the deaths of those detained under mental health legislation and/or looked-after children. It noted the Lord Advocate could have discretion not to hold an FAI in certain circumstances.</p> <p>In the Scottish Government's view, requiring mandatory FAIs for deaths while detained under mental health legislation was not proportionate. It argued that several agencies may investigate such deaths, with the possibility of a discretionary FAI as a final safeguard. It noted that the Mental Health (Scotland) Act 2015 gave the Scottish Government an obligation to review the arrangements for investigating the deaths of those undergoing hospital treatment for mental health conditions.</p> <p>The Scottish Government also opposed mandatory FAIs covering the deaths of looked-after children for similar reasons. It noted that a Child Death Review Steering Group was currently looking into a system for reviewing all child deaths.</p>	<p>The effect of amendments 1, 2, 3, 4, 5 and 6, in the name of Margaret Mitchell, would be to require a mandatory FAI where someone receiving hospital treatment for a mental health condition dies. Alison McInnes's amendment 2A would limit this to those who were actually detained under mental health legislation.</p> <p>Under amendment 5, the Lord Advocate would have discretion to opt out of holding a mandatory FAI if an investigation or inquiry had been carried out by the Mental Welfare Commission for Scotland.</p> <p>Amendments 1 to 6 and 2A were agreed to by division.</p> <p>Alison McInnes's amendments 52, 53, 54, 56, 57 and 58 would require mandatory FAIs for the deaths of looked-after children and dementia patients who had been treated with mood-altering drugs before their deaths.</p> <p>Amendment 52 was withdrawn. Amendments 53, 54, 56, 57 and 58 were not moved.</p>



Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
<b>FAIs for service personnel</b>		
<p>The Bill would re-state existing powers to carry out a discretionary FAI where service personnel die abroad in certain circumstances.</p> <p>However, it became clear during the Committee's evidence gathering that the deaths of service personnel in the course of duty in Scotland do not engage the requirement for a mandatory FAI. This is because service personnel are not technically employed. Instead they are Crown servants. Defence matters are reserved so the concern cannot be addressed directly by the Scottish Parliament.</p>	<p>The Committee welcomed the Scottish Government's commitment to taking this issue forward with the UK Government. It asked to be updated on progress.</p> <p>The Scottish Government confirmed that the UK Government had given its agreement in principle to taking this forward. This will be done at Westminster via an order under section 104 of the Scotland Act 1998, if the Bill is passed.</p>	<p>No action at Stage 2.</p>
<b>FAIs into deaths abroad</b>		
<p>The Bill would make it possible to hold a discretionary FAI where a Scottish resident dies abroad. The requirement that the body be repatriated to Scotland was questioned by several of those who supplied evidence.</p>	<p>The Committee welcomed provisions in the Bill which would allow an FAI to be held where a death occurred outside the UK. It recommended that the Bill should be amended to enable FAIs to take place in exceptional circumstances where the body has not been repatriated.</p> <p>The Scottish Government committed itself to bringing forward an amendment which would create some discretion in this area.</p>	<p>Scottish Government amendment 8 would remove the requirement for a body to be repatriated before an FAI could be held. It was agreed to without division.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
<b>Family liaison</b>		
<p>A number of witnesses questioned whether communications with bereaved families could be improved. This could be a particular issue where there was a long delay between a death and an FAI being held. It was argued that families were not always given enough information to understand the reasons for the delays.</p> <p>The Solicitor-General committed COPFS to producing a “family liaison charter” which would set standards for communications with families.</p>	<p>The Committee welcomed the commitment to produce a family liaison charter. It believed this would help address concerns around delays and family communications. The Committee asked to see a draft of the charter in advance of Stage 2.</p> <p>The Scottish Government also welcomed the commitment to produce a family liaison charter. It supported a proposal that the charter should be put on a statutory footing.</p>	<p>Amendment 59, in the name of Patricia Ferguson, would create an obligation on the Lord Advocate to produce a family liaison charter. The charter and any future revisions would require to be laid before the Scottish Parliament.</p> <p>The Minister for Community Justice and Legal Affairs supported this amendment. It was agreed to without division.</p>
<p>The Bill would require the Lord Advocate to give written reasons for a decision not to hold an FAI, if requested to do so. Some of those providing evidence argued that it should not be left to the family to ask for reasons.</p>	<p>The Committee noted that it did not believe that such information should only be provided to bereaved families on request. It recommended that the Scottish Government brought forward a Stage 2 amendment to address this concern.</p> <p>The Scottish Government emphasised that those families who wanted detailed reasons would get them. However, it argued that it was important to tailor the approach to the needs of individual families, some of which did not want written reasons. It therefore rejected this recommendation.</p>	<p>Margaret Mitchell’s amendment 7 would require the Lord Advocate to provide written reasons for a decision not to hold an FAI where someone was detained under mental health legislation at the time of their death. In other circumstances, a request for written reasons would be required.</p> <p>Amendment 7 was agreed to by division.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
<b>Participation in an FAI</b>		
<p>Under current legislation, various parties are entitled to participate in an FAI. These include the deceased's nearest relative and an employer where the death relates to a workplace accident. The sheriff can permit others with an interest to participate.</p>	<p>The Committee emphasised its support for trade unions and staff associations to participate in FAIs too.</p> <p>The Scottish Government argued that the sheriff's discretion to allow other interested parties to participate was wide enough to encompass trade unions. It did not therefore think that additional action was necessary.</p>	<p>Amendment 55, in the name of Elaine Murry, would automatically entitle a trade union or staff association representative to participate in an FAI. This would apply where the FAI related to a workplace accident and the deceased's trade union or staff association membership was relevant to that occupation.</p> <p>The Minister for Community Safety supported this amendment, subject to the option to refine the wording at Stage 3. Amendment 55 was agreed without division.</p>
<b>Legal aid</b>		
<p>As noted above, Lord Cullen recommended that legal aid rules be relaxed for families participating in an FAI. However, this recommendation was not taken forward by the Scottish Government. Patricia Ferguson's Inquiries into Deaths (Scotland) Bill contained proposals for alternative support for legal expenses.</p>	<p>The Committee noted the importance of family participation in an FAI, including legal representation where appropriate.</p> <p>The Scottish Government did not respond specifically to this general point.</p>	<p>Patricia Ferguson's amendment 60 would alter the current scheme for Civil Legal Aid for representation at an FAI. It would only apply to the deceased's nearest relative.</p> <p>The amendment would remove the requirement that a grant of legal aid was "reasonable" in the circumstances. It would also require Scottish ministers to bring forward new regulations governing financial eligibility.</p> <p>Amendment 60 was agreed to by division.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
<b>Sheriffs' recommendations</b>		
<p>Concerns were raised at Stage 1 that sheriffs' recommendations may not always be implemented. Lord Cullen's position around the publication of sheriffs' recommendations would only be partially implemented by the Bill. Patricia Ferguson's Inquires into Deaths (Scotland) Bill sought to make some sheriffs' recommendations legally binding.</p>	<p>The Committee considered that the Bill's requirement for those to whom recommendations were addressed to respond struck the right balance. It asked the Scottish Government to look again at ways of ensuring sheriffs' recommendations were acted upon.</p> <p>The Scottish Government reiterated its view that it would not be practical for one body to monitor compliance with sheriffs' recommendations. It noted that there was no evidence that recommendations were routinely ignored.</p>	<p>Amendment 61, in the name of Patricia Ferguson, would require Scottish Ministers to lay an annual report before the Scottish Parliament. This would contain information about FAIs which had taken place, including the number of sheriffs' recommendations made and responses received.</p> <p>The Minister for Community Justice and Legal Affairs supported this amendment. It was agreed to without division.</p>
<p>FAIs were considered by most of those supplying evidence to be inquisitorial. This means that the sheriff takes a lead role in testing the evidence and establishing the facts. Most other court proceedings are considered to be adversarial – in that one party is responsible for challenging the other party's evidence.</p> <p>Some witnesses raised concerns that FAIs may become more adversarial, which could undermine a sheriff's ability to establish the facts.</p>	<p>This issue was not the subject of a recommendation in the Stage 1 Report.</p>	<p>The Scottish Government's amendment 18 would prevent responses to sheriffs' recommendations being used in any other legal proceedings. An example might be using an admission in a response as a basis for bringing a negligence action.</p> <p>It was argued that such protection would encourage those responding to be as full and frank as possible.</p> <p>Amendment 18 was agreed to without division.</p>

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