

# **INQUIRIES INTO DEATHS (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Inquiries into Deaths (Scotland) Bill introduced in the Scottish Parliament on 1 June 2015. It has been prepared by Patricia Ferguson MSP, who is the member in charge of the Bill, under Rule 9.3.3A of the Parliament's Standing Orders. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 71-EN.

### **POLICY OBJECTIVES OF THE BILL**

#### **The main objectives of the proposed legislation**

2. The Inquiries into Deaths (Scotland) Bill ("the Bill") has been introduced by Patricia Ferguson MSP in response to her discussions with and the demands of Scotland's trade unions and many families of the victims of fatal accidents and other deaths in Scotland. The Bill has also been influenced by discussions with campaign groups such as Families Against Corporate Killers (FACK) and Scottish Hazards.

3. The Bill restates the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976<sup>1</sup> ("the 1976 Act") but with amendments to give effect to many of the recommendations of the 2009 Report on the Review of Fatal Accident Legislation by Lord Cullen<sup>2</sup> ("the Cullen Report") and certain other amendments which go beyond Lord Cullen's recommendations.

4. The Scottish Government issued its response to the review in 2011<sup>3</sup>, accepting the majority of Lord Cullen's 36 recommendations. On 19 March 2015, the Scottish Government has introduced a Bill<sup>4</sup> ("the Government's FAI Bill") which also seeks to restate the 1976 Act but with amendments to give effect to many of the recommendations of the Cullen Report which the Government has accepted.

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<sup>1</sup> Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14)

<sup>2</sup> <http://www.scotland.gov.uk/Publications/2009/11/02113726/11>

<sup>3</sup> Scottish Government, Response to the Recommendations from the Review of Fatal Accident Inquiry Legislation: <http://www.scotland.gov.uk/Publications/2011/03/18150120/0>

<sup>4</sup> Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (SP Bill 63)

5. The main amendments made in this Bill which go beyond the Cullen recommendations and which are different from the Government's FAI Bill are designed to achieve three overarching policy objectives—

- extending the scope of mandatory FAIs,
- to place families of the deceased at the heart of the inquiry process and to give them their proper place in relation to the investigation of the death of their loved one,
- to ensure that lessons are learned from the death and enforced for the purpose of ensuring the future safety of Scottish citizens.

6. In this Memorandum, an inquiry under the Bill is referred to as an FAI (Fatal Accident Inquiry) even although the Bill has the effect of not restricting such inquiries to cases where there has been a fatal accident.

7. These policy objectives, and the above problem with the reference to FAIs, neatly illustrate why it was not considered possible simply to re-state the 1976 Act with amendments to modernise its language and to give effect to the Cullen recommendations. This is in effect what the Government's FAI Bill does. However, it was considered that the policy objectives led to a far more fundamental review of the 1976 Act and a change in approach to FAIs generally.

8. Patricia Ferguson MSP held a consultation period from 2 August 2013 to 31 January 2014. There were 30 responses throughout this period. Of the 30 responses 24 were in favour of the Bill, five were against and one made no comment on support of the Bill. All responses to the Bill have been considered. The relevant responses and changes made to the consultation draft of the Bill relating to those responses are set out fully under the section of this Memorandum entitled "The Bill: The Main Amendments".

## **BACKGROUND: THE 1976 ACT**

9. The provisions which currently govern every aspect of FAIs are to be found in the 1976 Act.

10. An FAI is an inquisitorial judicial inquiry into certain deaths conducted by the sheriff. Its purpose is not to establish civil or criminal liability.

11. In its broadest sense, it serves two purposes—

- to find out what happened,
- to find out if there are any lessons which can be drawn from the death in order to prevent further deaths.

12. Under section 6 of the 1976 Act, the sheriff who hears the FAI is required to make a determination, which sets out the following circumstances so far as they have been established at the inquiry—

- where and when the death and any accident resulting in the death took place,

- the cause or causes of the death and any accident resulting in the death,
- the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided,
- the defects, if any, in systems of working which contributed to the death or any accident resulting in the death,
- any other facts which are relevant to the circumstances of the death.

13. Under the 1976 Act, deaths fall into two categories—

- deaths where there must be an FAI (mandatory FAI),
- deaths where there may be an FAI if the Lord Advocate considers certain conditions are met (discretionary FAI).

14. A discretionary FAI is where an FAI may be held if it appears to the Lord Advocate that the circumstances of the death are sudden, suspicious or unexplained, or has occurred in circumstances such as give rise to serious public concern and that it is expedient in the public interest that an inquiry should be held.

15. There are two categories of mandatory FAIs where, an FAI must be held. They are where—

- the death has resulted from an accident that was in the course of the deceased's employment,
- the person who has died was, at the time of death, in legal custody.

16. Even in the case of a death falling into one of the mandatory categories, the Lord Advocate can decide that there will be no FAI if two conditions are met—

- there have been criminal proceedings,
- the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established in the course of the criminal proceedings.

17. Similarly, if there has been an investigation under the Gas Act 1965, the Health and Safety at Work etc. Act 1974, or the Energy Act 2013, the Lord Advocate can decide that it is unnecessary to hold an FAI.

18. If the Lord Advocate takes that view, then the matter is at an end. The Lord Advocate is not required to issue a written judgement or to, in any other way, explain the view which has been taken. In terms of the legislation, the families have no right to question the Lord Advocate's decision, to influence it or to challenge it if they think that the Lord Advocate is wrong.

19. The Lord Advocate need only be satisfied that the circumstances of the death have been established (which is to say what happened and, perhaps, why it happened) to exercise discretion to determine that there shall not be an FAI. The Lord Advocate is not required to consider whether a FAI should be convened to consider what lessons should be learned from the death.

Under the current legislation, it would therefore seem that very little importance is placed upon the lessons to be learned from a death. Similarly, there is little emphasis on ensuring that a judicial investigation takes place into the death in order that things will be safer for everyone.

## **THE BILL: THE MAIN AMENDMENTS**

20. The main amendments made in the Bill to give effect to the three overriding policy objectives, and the need, reasons and justification for them, are explained in the following paragraphs.

### **Extending the scope of mandatory FAIs**

#### *i. Equal treatment of work-related incidents*

21. The 1976 Act already provides for a mandatory FAI where a death has resulted from an accident occurring in Scotland that was in the course of the deceased's employment. However other employment related incidents which result in the death of an employee, such as industrial diseases or exposure to hazardous substances, are not subject to a mandatory FAI, although they may be the subject of a discretionary FAI.

22. There is no justification for such a distinction because the impact on the family of the deceased is the same and because the importance of lessons being learned is identical.

23. Section 2 of the Bill, therefore, proposes to extend the scope of mandatory FAIs to cover all work-related deaths, whether resulting from an accident or from an industrial disease or exposure to certain substances due to the nature of person's employment.

24. During the consultation process, proposals to extend mandatory FAIs to cover historic casualties of industrial disease and such exposures were generally well received. However, some concerns were raised (Crown Office & Procurator Fiscal Service, Faculty of Advocates, Forum of Insurance Lawyers).

25. Accordingly, the Bill recognises that some deaths caused by industrial disease and such exposures will be in circumstances where the exposure was many years earlier and where the circumstances of such disease and exposure are well known. For this reason, the Bill makes special provision for an exception in such cases. It provides that a mandatory FAI need not be held in such a case if the Lord Advocate is satisfied that the method and circumstances of exposure to the disease or substance hazardous to health is well known within the industry within which the exposure took place and that no further lessons can be drawn from the death (section 9(5)).

#### *ii. Deaths while in legal custody and other forms of compulsory detention etc.*

26. The 1976 Act already provides for a mandatory FAI where a death has occurred at a time when the person was in legal custody. This is re-enacted in section 3(1)(a).

27. The Cullen Report recommended<sup>5</sup> that this category should in effect be extended to cover cases where death occurred at a time while the person was subject to compulsory detention by a public authority within the meaning of section 6 of the Human Rights Act 1998. This is intended to include various cases where the court orders a person to be detained in a hospital, whether for reasons of mental illness or public health. This is given effect to in section 3(1)(b) and (3) of the Bill.

28. The Cullen Report also recommended<sup>6</sup> that a FAI should be mandatory in the case of the death of a child who was, at the time of death required to be detained in a residential establishment or other secure accommodation. This is given effect to in section 3(1)(e) which refers to a child required to be kept or detained in secure accommodation. This would include a child subject to a child protection order.

29. During the consultation process, there were various queries raised seeking to extend mandatory FAIs in other cases, such as deaths of voluntary patients in psychiatric hospitals; those subject to compulsory orders living in the community; and those subject to detention under the use of legal guardianship.

30. The Bill therefore requires a mandatory FAI to be held where the person was, at the time of death—

- subject to a compulsory treatment order or an interim compulsory treatment order under the Mental Health (Care and Treatment) (Scotland) Act 2003, whether or not detained in a hospital, or
- a voluntary patient in a hospital for treatment of mental disorder.

### **Placing families of the deceased at the heart of the inquiry process**

#### *i. Delays*

31. There are currently no rules relating to the speed of the FAI process. There have been many examples over the years of families waiting two, three, four, and, on occasion, more years for an FAI to be held. This is a glaring omission in the current procedures. Those affected by the loss of a loved one require answers as quickly as possible. Families cannot move on with their lives until they have the answers they need. One of the key objectives in the Bill is to provide time limits as much as possible.

32. The Bill, therefore, proposes various time limits within which decisions require to be reached and notified to the family.

33. One of the biggest concerns noted throughout the consultations was that the current FAI system suffers from delays. 27 respondents answered question 4 of the consultation relating to timescales and of those 27, 22 were in support of the new time limits.

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<sup>5</sup> See paragraphs 4.15 and 4.20

<sup>6</sup> Paragraph 4.27

34. Some respondents to the consultation qualified their support for the Bill proposals for reasons such as—

- time limits must be realistic (Forum of Insurance Lawyers),
- focusing on meeting time limits must not reduce the effectiveness of the inquiry process (Associated Society of Locomotive Engineers & Firemen),
- enough time must be allocated for information gathering to determine whether an FAI should be held (CMS Cameron McKenna), and
- time limits must take into account the resources of the Crown (Simpson & Marwick).

35. Account has been taken of these considerations in the Bill. The Bill sets out the following timescale in cases where there is no criminal or inquiry proceedings of a kind specified in section 9—

- the Lord Advocate has six months from the death to notify the relatives as to whether it is intended to apply for an FAI and, if so, when it is intended to do so (section 7),
- thereafter, the Lord Advocate has three months to apply to the sheriff for an FAI or, if that is not possible, a later date which is to be as soon as practicable thereafter (section 11),
- thereafter the sheriff to whom the application has been made for an FAI requires to hold a preliminary hearing within three months after the application has been made (section 15).

36. In other words, in the case where there are no criminal or inquiry proceedings, the Bill envisages that the preliminary hearing should be held about a year after the death. However, even in this case, the Lord Advocate has some flexibility in meeting the various timescales but the important point is that the Lord Advocate has to keep the relatives informed as to whether there is going to be a delay and, if so, the reasons for it. There is no time limit for the start of the FAI after the preliminary hearing has been held.

37. Opposition from some respondents was due to possibility of time limits colliding with criminal proceedings (Crown Office & Procurator Fiscal Service; Forum of Scottish Claims Managers; NFU Mutual; Zurich Insurance).

38. Account has been taken of these considerations in the Bill. The Bill sets out the following timescale in cases where criminal or inquiry proceedings specified in section 9 are taken in relation to the death of a person—

- the Lord Advocate has six months from the death to notify the relatives that it is not possible to determine whether an FAI is to be held because criminal or inquiry proceedings have commenced and are not yet concluded (section 7),
- the Lord Advocate has three months from the conclusion of the criminal or inquiry proceedings to notify the family of the deceased as to whether or not it is intended to apply for an FAI (section 10),

- if there is to be an FAI, the Lord Advocate must apply to the sheriff to hold an FAI within a period of three months from that notification or as soon as practicable thereafter (section 11),
- thereafter, the sheriff to whom the application has been made for an FAI requires to hold a preliminary hearing within three months after the application has been made (section 15).

39. In other words, where there are criminal or inquiry proceedings, the Bill envisages that the preliminary hearing could be held about nine months after the conclusion of those proceedings. However, even in this case, the Lord Advocate has some flexibility in applying for an FAI after notifying the family that it is intended to do so but the important point is that the Lord Advocate has to keep the relatives informed as to whether there is going to be a delay and, if so, the reasons for it. There is also no time limit for the start of the FAI after the preliminary hearing has been held.

40. Accordingly it is believed that the time limits provided in the Bill will be the most efficient for the families involved without causing any significant impact upon other proceedings.

*ii. Transparency and written notification*

41. The current FAI system lacks transparency. The Lord Advocate has many powers under the current legislation which can be exercised without any clear or transparent decision-making process being undertaken.

42. The families of the deceased all too often feel peripheral to the FAI process. They require and deserve full written notification of the most important decisions about that process and, in particular, as to whether or not there is to be an FAI. This is also the case irrespective of whether or not criminal or inquiry proceedings of the kind specified in section 9 are taken in respect of the death.

43. The proposals in the Bill require the Lord Advocate to produce written notification in these circumstances (sections 7 and 10).

44. This will place enable the families of the deceased to question the Lord Advocate and, where appropriate, challenge the decision by way of a judicial review.

45. Throughout the consultation process there was a large majority in favour of written notification. 26 of the 30 respondents answered question 6 relating to written decisions. Of the 26, 23 were in favour. The remainder were undecided on the matter. There were no respondents who opposed this provision.

*iii. The family having a role in shaping the scope of the inquiry*

46. Under the current FAI system, an inquiry can have a very narrow or a very wide scope of investigation. There are many occasions where the family of the deceased believes that to get to the truth of what happened and, more importantly, to ensure that all of the relevant lessons are

learned in order that no-one else will be injured like their loved one, it is necessary for the scope of the inquiry to be cast as widely as possible.

47. Currently there is no process which allows the family to express that view, let alone influence matters accordingly. Instead, the matter rests entirely within the absolute discretion of the sheriff. While there is currently a procedure for a preliminary hearing to be held before the full inquiry hearing, there are no means by which the family or its legal representative can make submissions on the very important matter of the scope of the inquiry.

48. There were 24 responses from the 30 respondents in relation to this during the consultation period. The results showed that 16 of the 24 were in favour of such changes. Some responses felt that the families should play a role from beginning to end. There were two responses which were opposed to this proposal. One of the main reasons there was opposition was due to the fact the proposal shifts focus from the true purpose of holding an FAI. This will not be the case as the Bill provides the family with no more than the right to make the relevant submissions. The ultimate decision still rests with the sheriff and the proposal, therefore, does not erode in any way the integrity of the inquiry process or the inquisitorial role of the sheriff.

49. The Bill, therefore, provides that, at the preliminary hearing, the families may make submissions upon the scope and extent of the investigation of the inquiry.

#### *iv. Funding*

50. The Scottish Trades Union Congress noted in relation to question 12 of the consultation that consideration is required of the funding mechanisms in place to provide for legal representation of those involved in the process.

51. The Bill recognises that funding for legal representation can often be the difference between the family of the deceased being able to obtain legal representation or not. Funding is therefore essential to the family's ability to access justice and fully participate in the inquiry. The Bill, therefore, proposes that the Court of Session may make rules by act of sederunt under section 34 which, among other things, may provide for the circumstances within which families may be awarded funding.

52. The Bill also provides the circumstances (assuming that there are such rules) within which the sheriff may award funding (sections 15(6)(g) and 34(2)(j)).

### **To ensure that lessons are learned for the purpose of ensuring the future safety of Scottish citizens**

#### *i. Lessons to be learned are as important as finding out what happened*

53. An FAI must serve two purposes. It must—

- ascertain the circumstances of the death in the narrow sense of when and where the death occurred and the causes of that death and of any accident which caused the death, and also

- consider what are the lessons which can be drawn from that death as to what action requires to be taken, or not to be taken, in order to prevent further deaths in similar circumstances in the future. Neither matter is more important than the other.

54. The determination made by the sheriff under section 21 sets out what are the findings which the sheriff finds established on the evidence at the FAI in relation to both these matters. However, it is the findings of the sheriff on what are the lessons to be drawn which then form the basis of what recommendations the sheriff makes under section 22 and to whom they may be addressed.

55. The Bill recognises the equal importance of both of those matters by defining, in section 1(2), references in the Bill to “the circumstances of the death” as including both of those matters.

*ii. An inquiry in relation to lessons to be learned*

56. It follows from this consideration that it is entirely appropriate that an FAI can, should and must be held where the circumstances of the death in the narrow sense are known but where there are still issues that ought to be explored to ensure that all of the lessons from the death are learned. This means that evidence needs to be led to enable the sheriff to make relevant findings as to what are those lessons which can form the basis of any recommendations as to what action requires to be taken, or not to be taken, in order to prevent further deaths in similar circumstances in the future.

57. Throughout the consultation period there were 26 answers from the 30 responses relating to question 2 on the lessons that can be learned following a death. The response to this were mostly positive with 25 agreeing in principle that there should be equal emphasis on the need for there to be equal emphasis on both how a death occurred and ensuring lessons are learned from it.

58. The Bill specifically provides that, where an FAI requires to be held and there have been criminal or inquiry proceedings of the kind specified in section 9, an FAI requires to be held unless the Lord Advocate is satisfied both—

- that all the circumstances of the death have been sufficiently established at those proceedings, and
- that no further lessons can be drawn from the death which might be the subject of recommendations by the sheriff under section 22.

59. If the Lord Advocate is only satisfied about the first of those matters, an FAI still requires to be held into what are the lessons which might be drawn from the death. The Bill makes provision for an inquiry only into the matters about which the Lord Advocate is only partially satisfied (section 10(3)).

*iii. Sheriff's recommendation, enforcement etc.*

60. Currently a sheriff's recommendations in a determination under the 1976 Act are just that – recommendations. They carry no weight and are not enforceable. Recommendations without the backing of a means of enforcing them are worthless. There is no better example of this fact than the Newton and Bellgrove train disasters and the recommendations in relation to “double blocking” highlighted in the consultation document.

61. There were 28 answers from the 30 respondents during the consultation period in relation to question 3 on the enforcement of sheriffs' recommendations. 18 of these were in favour of enforcement powers, two were uncertain and seven opposed the proposal. One of the main reasons for the support was that the current FAI system is riddled with failings which prevent recommendations from being binding.

62. The Bill contains various provisions which set out the circumstances in which—

- a person, to whom a proposed recommendation is addressed, is given the opportunity of being heard before the recommendation is made (sections 22(4) (advance notice) and 23(warning notice),
- if that person fails to implement that recommendation, the sheriff may, again after hearing any representations from that person, make an order requiring that recommendation to be implemented within a specified period (section 25(3)), and
- that person may be found guilty of an offence if that person fails, without reasonable excuse, to do anything which that person is required to do by the order. If found guilty, such a person is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 4 on the standard scale (currently £2,500) or to both (section 25(6) and (7)).

63. In this way, the Bill seeks to give the person to whom such a recommendation is addressed a fair opportunity of arguing against it (for example, on grounds of cost or practicality), before that person can be found guilty of that offence.

64. Concerns were raised by a number of respondents regarding the lack of a right of appeal against a sheriff's recommendation or against that recommendation being addressed to a person. This Bill has now incorporated provisions to allow for an appeal to the Sheriff Appeal Court and to the Court of Session (sections 26-31).

## **ALTERNATIVE WAYS OF MEETING POLICY OBJECTIVES**

65. There are no alternative means by which the policy objectives of the Bill can be met and, in particular, there are no non-legislative means by which the objectives can be achieved.

66. FAIs are a creature of statute. It is widely recognised that the current system is unfit for purpose. Lord Cullen's Review recognised the need for reform and made various recommendations for statutory reform. The Scottish Government has also recognised the need for reform and has introduced a Bill to achieve its policy objectives.

67. Both Lord Cullen and the Scottish Government recognised that reform required legislation. Patricia Ferguson's Bill goes further, in terms of reform of the system, than both. Legislation is clearly required and is the only way her policy objectives can be achieved.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

68. The provisions in the Bill do not discriminate on the basis of age, disability, sex (including pregnancy and maternity), gender reassignment, sexual orientation, race or religion and belief. All parties are judged to benefit from fewer delays in the system.

69. Based on the lack of evidence available and the absence of concerns raised in the consultation exercises, it is considered that there are no significant impacts on people because of their paternity or pregnancy status, age, race, religion or belief, sex, disability, sexual orientation or transgender status. The Bill will remedy the anomaly that civil partners have not been treated in the same way as spouses in relation to being notified whether or not an FAI is to be held.

70. Overall, it is believed that the Bill will provide for a more efficient and effective FAI system where users will experience fewer unnecessary delays. An effective system should benefit, either directly or indirectly, all sections of society.

### **Island communities**

71. The provisions of the Bill apply equally to all communities in Scotland.

72. It is not expected that there will be any changes to the holding of FAIs at Scotland's island sheriff courts. While the Bill breaks the link between the location of death and the local sheriff court district and permits greater use of alternative accommodation, it is expected that FAIs arising from deaths in remote and rural locations, including the islands, will continue to be held at the local sheriff court in order that bereaved families and witnesses will not have to travel excessive distances.

### **Local government**

73. It is believed that the Bill will have little direct impact on local authorities but that they will benefit in the same way as other court users from the reforms in terms of FAIs being dealt with more promptly and efficiently.

### **Sustainable development and environmental issues**

74. It is not thought that the Bill will have any negative impact on sustainable development. There will be a positive effect in that deaths in circumstances similar to those investigated at an FAI may be avoided in the future, thus contributing to sustainable development in that families and businesses will not be disadvantaged by a sudden death.

## **Human rights**

75. Article 2 of the European Convention on Human Rights is headed ‘right to life’ and its general requirement is that everyone’s right to life must be protected by law.

76. The case law of the European Court of Human Rights has established that Article 2 comprises both a ‘substantive aspect’ requiring the State to refrain from taking life and to take measures to positively safeguard life and a ‘procedural aspect’. The procedural aspect is sometimes referred to as the ‘investigative obligation’ and requires the State to provide for an independent, impartial and effective official investigation into deaths in certain circumstances.

77. The application of Article 2 is fact-sensitive to individual cases but Article 2 will be particularly relevant where there is the appearance of State responsibility or complicity in a death (for example where an individual dies in prison or otherwise in State custody) or where there are suspicious or unusual circumstances.

78. The Bill makes a significant positive contribution to the realisation in Scotland of the procedural element of Article 2 rights by extending the scope for mandatory FAIs in certain cases (including by reference in section 2 to an expanded definition of legal custody).

79. Article 2 requirements, including requirements as to promptness and reasonable expedition which are also fact-specific for each investigation, are directly applicable on the Lord Advocate and procurators fiscal. It is thought that the statutory timetable provided in the Bill will help in this connection.

80. However, it is important to note that the Article 2 procedural aspect may be realised in Scotland by other means such as the types of inquiry proceedings distinct to a FAI referred to in section 9(3). Further, Article 2 is realised in Scotland by systems of general application such as an effective criminal and civil justice system (for example damages actions for wrongful deaths), the regulation of dangerous activities and high ethical and professional standards in the field of medicine.



*This document relates to the Inquiries into Deaths (Scotland) Bill (SP Bill 71) as introduced in the Scottish Parliament on 1 June 2015*

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