

Justice Committee

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

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Society welcomes the opportunity to respond to the Scottish Parliament's Justice Committee's call for evidence upon the general principles of the Inquiries into Fatal Accidents and Sudden Deaths Etc. (Scotland) Bill and has the following comments to make.

General Comments

The Society welcomes the policy objective of the bill which is to reform and modernise the law governing the holding of Fatal Accident Inquiries (FAIs) in Scotland.

The Society has in the past, expressed concern to the number of times an Act of either the United Kingdom Parliament or the Scottish Parliament has been amended by subsequent legislation, the Criminal Procedure (Scotland) Act 1995 being one example where the Act has been amended on numerous occasions. With particular reference to Section 37 of the bill, the Society welcomes the repeal of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 its entirety and replacement with the terms of this bill.

The Society also has the following comments to make.

The Society responded to the Scottish Government Consultation entitled "Proposals to Reform Fatal Accident Inquiries legislation" in September 2014. The Society then made reference to its comments on PE1501 which was firstly considered by the Scottish Parliament's Public Petitions Committee and was then considered by the Justice Committee at its meeting held on 3 February 2015.

In response to the Petition 1501 it was the Society's belief that the Petition seeks to give family members the right to seek judicial enquiries. In its response, the Society stated that, if only a small number of families are dissatisfied with the decision of the Lord Advocate not to hold an FAI, then the creation of a statutory right to request an FAI may result in only a very small number of additional hearings per annum throughout Scotland. Such a Hearing would provide closure to those families with unanswered questions, should have a minimal economic impact, but reinforce public confidence in Scotland's system for investigation of apparently self-inflicted deaths.

The Society believes that, ultimately, it would be a matter for the Sheriff at a Preliminary Hearing to decide upon the information placed before him or her by the family of the deceased and by Crown Office as to whether or not to hold an evidential inquiry.

The Society also notes that Lord Cullen's recommendation that the "test of reasonableness" for relatives of the deceased is not to be implemented in terms of the Bill.

The Society makes particular reference to paragraph 22 of the Policy Memorandum accompanying the Bill and specifically to Lord Cullen's recommendation number 23.

The Society is concerned that this recommendation is not being taken forward as it believes that, for most relatives of the deceased, the thought of attending Court and cross examining witnesses would at the very least be a daunting task and legal representation should be considered necessary.

On the basis that fatal accident inquiries are fact finding inquiries held in the public interest and are not intended to establish guilt or blame in the criminal or civil sense, we believe that this fact finding exercise can of course be extremely complex and that the civil rules of evidence apply.

With particular reference to paragraphs 53 and 54 of the Policy Memorandum, we remain concerned that the decision not to implement Lord Cullen's recommendation at number 23 appears to be based against the background of the current financial climate.

We note that the expense of increasing availability of legal representation would be minimal in terms of the entire legal aid bill.

With particular reference to legal aid in respect of relatives under Article 2 of the European Convention on Human Rights, when an inquiry is investigating a potentially unlawful killing by agents of the state or a death in legal custody, we note that Scottish Government accepts that it will be generally appropriate for relatives of the deceased to secure independent legal representation.

We suggest that, where this test is met, there should not be further delay while SLAB carries an inquiry into that person's means.

We also have the following comments to make.

Section 2 – Mandatory Inquiries

We are generally pleased with the provisions at Section 2 and 3 of the Bill. In particular, that Section 2 of the Bill implements Lord Cullen's recommendation number 5 to extend legislation to cover death of a person detained by police from "Borstal Institution" to be changed to "secure accommodation" and in this respect notes Section 2(4)(b) of the Bill which covers the death of a person if, at the time of death, the person was a child required to be kept or detained in secure accommodation.

Sections 6 - Inquiries into deaths occurring abroad: general

We agree that the Lord Advocate should, subject to the death of a person within Section 12(2) or (3) of the Coroners and Justice Act 2009 (investigation in Scotland of deaths of service personnel abroad) have the discretion to hold an FAI into the death of a person which occurred outwith the United Kingdom where, at the time of death, the person was ordinarily resident in Scotland and the person's body has been brought to Scotland. We are pleased to note that Section 6(3) of the Bill sets out the circumstances as to when and in what circumstances such an inquiry should be held and, that the Lord Advocate decides that it is in the public interest for an inquiry to be held into the circumstances of the death.

Section 8 – Reasons for decision not to hold an inquiry

We refer to our general comments and remain of the view that some consideration could be given to a small number of families who are dissatisfied with this decision, then the creation of a statutory right to request an FAI may result in a very small number of additional Hearings per annum throughout Scotland.

Section 12 – Jurisdiction in relation to inquiries

We agree that the Sheriff should be entitled to make an order transferring proceedings to a Sheriff of another Sheriffdom on the basis that the Procurator Fiscal and the participants in the inquiry have had an opportunity to make representations about the proposed transfer and the consent of both the Sheriff Principal of the Sheriffdom of which the Sheriff is a Sheriff and the Sheriff Principal of the Sheriffdom to which the Sheriff proposes to transfer the proceedings has been obtained. This should be done on the basis that the proposed transfer results in the FAI being held in the most suitable Court.

Section 15 – Preliminary hearings

We agree that a focussed preliminary hearing would be of benefit to all parties.

With particular reference to Section 15(4) of the Bill, we believe that Rules for the conduct of preliminary hearings is appropriate.

While these rules will be published on the Scottish Court and Tribunal Service website, we believe that there may be some merit in liaison with the publishers of volumes of Criminal and Civil Court Statutes and Rules to ensure that these Rules are published in both volumes.

It is anticipated that a preliminary hearing as referred to in Section 15, whether that includes meeting experts or otherwise, should help to speed up fatal accident inquiries.

Section 26 – Dissemination of the sheriff’s determination

We consider this a worthwhile proposal on the basis that the Sheriff who has conducted the Hearing is best placed as to who would clearly benefit from his or her findings and in this respect welcome Section 26(1)(b)(iv) of the Bill.

Section 27 – Compliance with sheriff’s recommendations

We note that a person to whom a recommendation is addressed must, if the person was a participant in the inquiry to which the recommendation relates, give the Scottish Courts and Tribunal Service a response in writing.

While we believe that the sheriff’s recommendations should of course be acted upon, we are concerned that there do not appear to be any sanction proposed against parties where they failed to comply or cooperate.

We remain concerned that this process could involve the Scottish Courts and Tribunal Service in protracted correspondence with parties well after the inquiry has been concluded.

Alan McCreadie
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