Ministerial Foreword to the consultation on proposals to reform and modernise the law on fatal accident inquiries in Scotland

I am delighted to present a Consultation Paper which will inform a prospective Bill to replace the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976.

The intention is to largely implement the recommendations made by the former Lord President of the Court of Session, the Rt Hon the Lord Cullen of Whitekirk KT, in his 2009 Review of Fatal Accident Inquiry Legislation¹. Lord Cullen and his team conducted a most thorough and far-reaching review and I should like to pay tribute to their diligence and far sighted thinking. A Scottish Government response to the Review was published in March 2011².

Lord Cullen made 36 recommendations for reform of the system. Some of these recommendations were addressed to the Crown Office and Procurator Fiscal Service (COPFS) and have already been implemented (see chapter 4).

The purpose of this consultation is to build on the changes which have already been made by COPFS and to consider further some of the main areas identified prior to the Review as requiring attention.

Concerns have been expressed in relation to certain high profile cases in the past in relation to the length of time taken to hold an FAI and it is right that the system was reviewed to ensure that it provides an effective and practical system of judicial inquiry into deaths in the public interest and that the legislation should now be modernised in the light of that Review and brought into the 21st century.

¹ http://www.scotland.gov.uk/Publications/2009/11/02113726/0
² http://www.scotland.gov.uk/Publications/2011/03/18150120/1
Inevitably some of the consideration of the system of FAIs will relate to the system of death investigation which has traditionally been carried out by procurators fiscal in Scotland. The relationship between the two forms of inquiry is explored further in chapter 4, but in general the purpose of an FAI is to establish the time, place and cause of death and, crucially, any precautions which might be taken in future to avoid deaths in similar circumstances. FAIs are therefore held in the public interest – they are not intended to provide a venue for bereaved families to establish grounds for future civil action.

I look forward to receiving your comments on the issues raised in this consultation paper.

Kenny MacAskill MSP
Cabinet Secretary for Justice
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th>page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ministerial foreword</td>
<td>1</td>
</tr>
<tr>
<td>Introduction</td>
<td>4</td>
</tr>
<tr>
<td>Chapter 1: Cullen recommendations</td>
<td>8</td>
</tr>
<tr>
<td>Chapter 2: Mandatory categories of FAIs</td>
<td>12</td>
</tr>
<tr>
<td>Chapter 3: Deaths abroad</td>
<td>15</td>
</tr>
<tr>
<td>Chapter 4: Delays</td>
<td>18</td>
</tr>
<tr>
<td>Chapter 5: Fatal Accident Inquiry accommodation</td>
<td>23</td>
</tr>
<tr>
<td>Chapter 6: Sheriffs’ recommendations</td>
<td>25</td>
</tr>
<tr>
<td>Chapter 7: Legal aid for bereaved relatives</td>
<td>30</td>
</tr>
<tr>
<td>Chapter 8: Responding to this consultation paper</td>
<td>33</td>
</tr>
<tr>
<td>Chapter 9: The Scottish Government consultation process</td>
<td>35</td>
</tr>
<tr>
<td>Annex A: Respondent Information Form</td>
<td>36</td>
</tr>
<tr>
<td>Annex B: Consultation Questionnaire</td>
<td>37</td>
</tr>
<tr>
<td>Annex C: Equality Impact Assessment</td>
<td>43</td>
</tr>
</tbody>
</table>
INTRODUCTION

This consultation invites views on proposals to amend the legislation that governs Fatal Accident Inquiries (FAIs) by implementing most of Lord Cullen’s recommendations in his 2009 Review of Fatal Accident Inquiry Legislation. The consultation period is 10 weeks as there was a public consultation for Lord Cullen’s Review.

Background

Procurators fiscal investigate all sudden, suspicious, accidental and unexplained deaths to establish the cause of death and the circumstances which gave rise to the death. Fiscals carry out a full and thorough investigation into the circumstances and will decide what further procedure, if any, is required, including whether any criminal proceedings are necessary or whether it would be appropriate to instruct an FAI.

The investigation of death in Scotland is at the instigation of the Lord Advocate and the statutory independence of the Crown ensures that all police investigations into all sudden deaths are subject to independent scrutiny by the Crown Office and Procurator Fiscal Service (COPFS). The Scottish Fatalities Investigation Unit (SFIU) are a specialised unit within COPFS that take on responsibility for investigating all deaths that require further investigation, allowing such investigation to be carried out thoroughly and expeditiously by dedicated specialists. Where the cause of death has not been ascertained or further enquires are required, SFIU instruct the police to carry out investigations on their behalf. Investigation of death is thus independent of the Scottish Government.

An FAI is an examination of the circumstances of a death to determine the time, place and cause of death. FAIs are mandatory for deaths that occur as a result of an accident in the course of employment or in legal custody, though the Lord Advocate is permitted to waive the necessity of holding an FAI if he considers that the circumstances of the death have been adequately investigated during criminal proceedings. A procurator fiscal, under the authority of the Lord Advocate, can instruct an FAI into other sudden or unexplained deaths, if it appears to the Lord Advocate that it would be in the public interest that an inquiry be held into the circumstances of a death which is sudden, suspicious or unexplained or has occurred in circumstances which give rise to serious public concern.

FAIs are usually held in a sheriff court though they can be held in alternative accommodation in a town or city where there is a sheriff court – an example being the recent FAI into the 2009 Super Puma crash was held in the Council Chamber of Aberdeen City Chambers. The sheriff makes a determination as to the time, place and cause of death and can make recommendations as to how deaths in similar circumstances may be avoided in the future.

There are only around 50-70 FAIs per year (though there were only 38 in 2012), but over 13,000 deaths are reported to procurators fiscal each year. Therefore, the overwhelming majority of deaths investigated by procurators fiscal do not result in an FAI.
Inquiries in the public interest

FAIs are fact-finding inquiries held in the public interest – they are not intended to establish guilt or blame in the criminal or civil sense. The sheriff will make a determination as to the cause of the death and may make recommendations as to how deaths in similar circumstances may be avoided in the future.

According to Patricia Ferguson MSP’s consultation paper[^3] on her proposed Inquiries into Deaths (Scotland) Bill, FAIs do not sufficiently address the needs of bereaved families.

Her proposed Members’ Bill would effectively change the nature of FAIs from inquiries held in the public interest into preliminary hearings for subsequent civil proceedings. That is not the purpose of an FAI which is to establish the time, place and cause of death and, particularly, any precautions which might be taken in future to avoid deaths in similar circumstances.

Procurators fiscal are acutely aware of the trauma, pain and anxiety which follows the death of a loved one and they provide appropriate support to families.

Whether an FAI is ultimately instructed following a sudden or unexplained death or not, the nearest relatives are given the opportunity to be fully engaged in the investigative process by COPFS. At an early stage, nearest relatives are provided with a point of contact in the Procurator Fiscal’s Office so that they can raise any concerns and issues directly with that person. They are also provided with the opportunity to meet with the procurator fiscal to raise any concerns or issues that they may have regarding the circumstances of the death. Fiscals will explain the process of the investigation and keep the family up to date with progress. This process can sometimes lead to additional investigation being undertaken by the procurator fiscal to address any concerns raised.

Relatives bereaved by homicide, road traffic incidents and in circumstances likely to lead to a mandatory FAI are supported by the COPFS Victim Information and Advice (VIA) service.

VIA staff will provide general information to nearest relatives about the process of deaths investigation and FAI procedures. They will provide case-specific information about the progress of the investigation and inquiry and can facilitate referral to local support agencies.

In relation to the release of documentary evidence, COPFS will release documentation to families on request where it does not contravene legal obligations, such as those under the Data Protection Act 1998. This can only be done after any criminal proceedings have concluded, otherwise there is a danger that a criminal trial may be compromised by evidence being released into the public domain.

Once investigations are concluded, relatives are invited to discuss the findings with the procurator fiscal and, where an FAI is discretionary, their views as to whether

[^3]: [http://www.scottish.parliament.uk/parliamentarybusiness/Bills/66152.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/66152.aspx)
there should be an FAI will be explored and taken into account. The families' views cannot be the only determining factor as the public interest is paramount. Bereaved relatives do not always wish the distressing details of the death of a loved one to be aired in public, but the public interest may demand that an FAI is held.

If families are not satisfied with the outcome of an FAI, then they are able to challenge the findings of the FAI by raising a judicial review of the inquiry.

2009 Review and the Scottish Government’s response

Lord Cullen’s review sought to ensure that Scotland had an effective and practical system of public inquiry into deaths which was fit for the 21st century. The Scottish Government considered Lord Cullen's 36 recommendations in consultation with colleagues in the Scottish Court Service (SCS) and the COPFS, as a number of the recommendations had implications for them. In 2011 the Government issued its response to Lord Cullen’s Report, agreeing with the majority of the recommendations.

Where the Government was not able to agree, reasons were provided and these are discussed further in this consultation paper. COPFS has implemented the six non-legislative recommendations addressed to it, which are discussed in chapter 5. There is support for the recommendations that are directed at SCS and the Lord President and their response is in Chapter 1.

Proposals in this consultation paper

This consultation paper invites views on proposals, arising from Lord Cullen’s recommendations, intended to help modernise the way in which FAIs are handled in Scotland. In particular, the proposals will build on the recommendations which have already been implemented by COPFS to address delays in holding FAIs. They will also bring the procedure followed in relation to sheriffs' determinations and any recommendations made by them in line with the practice followed after Coroner’s Inquests in the rest of the United Kingdom, to ensure that the recommendations are implemented or reasons given for non-compliance.

The paper has been divided into chapters covering each policy area being considered:

Chapter 1 – Cullen recommendations
Chapter 2 – Mandatory categories of FAIs
Chapter 3 – Deaths abroad
Chapter 4 – Delays
Chapter 5 – Fatal Accident Inquiry accommodation
Chapter 6 – Sheriffs’ recommendations
Chapter 7 – Legal aid for bereaved relatives

Some of Lord Cullen’s recommendations require primary legislation and that is what this consultation will focus on. Rules for the procedure of FAIs will be drafted as part of the implementation of the proposed Bill and these will be consulted on with relevant stakeholders with an aim to improve and strengthen the procedure for FAIs.
The proposed Bill will repeal the current Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 and enact new legislation to govern the system of FAIs in Scotland.
CHAPTER 1: Cullen recommendations

Lord Cullen summarised his recommendations at the end of his Review with references to the paragraphs of the Review where they appear, and grouped them together where appropriate.

Table 1 summarises each recommendation followed by the body that should have the responsibility for taking the recommendation forward. If the recommendation has been implemented, or if it is not being taken forward, this has been stated. Some of the non-legislative recommendations were directed at the COPFS and have already been implemented (see Chapter 4). Recommendations that are supported and require changes to legislation will be taken forward by the Scottish Government (SG) either in the Bill or in rules to be made under the Bill. The remaining recommendations are a matter for the Lord President (LP) and SCS, for which new legislation is not required.

Table 1

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<tr>
<th>Recommendation</th>
<th>To be taken forward by</th>
<th>Implementation</th>
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<tbody>
<tr>
<td>Sheriff Court and sheriffs</td>
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<tr>
<td>1</td>
<td>Ensure distinction between FAIs and criminal cases by: not holding FAIs in a criminal courtroom; dispensing of and wigs, gowns and hostile questioning</td>
<td>LP and SCS</td>
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<td>2</td>
<td>Sheriff with appropriate skills and experience to be assigned to a complex FAI</td>
<td>LP</td>
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<td>3</td>
<td>Judicial Institute of Scotland to provide training on FAIs</td>
<td>LP</td>
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<td>Mandatory FAIs</td>
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<td>4</td>
<td>Maintain provision for mandatory FAIs into work-related deaths</td>
<td>SG</td>
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<td>5</td>
<td>Extend legislation to cover death of a person detained by police; term ‘borstal institution’ to be changed to ‘secure accommodation’</td>
<td>SG</td>
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<td>6</td>
<td>Independent investigation for the death of a person subject to compulsory detention by a public authority within the meaning of s6 of the Human Rights Act</td>
<td>SG</td>
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<td>7</td>
<td>Extend legislation to cover death of a child in a ‘secure care’</td>
<td>SG</td>
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<td>8</td>
<td>The Lord Advocate’s power to make an exemption from a mandatory inquiry (if the circumstances have been adequately investigated in criminal proceedings) should be extended to cases where a public inquiry has been held under the Inquiries Act 2005</td>
<td>SG</td>
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<td>The scope of FAIs</td>
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<td>9</td>
<td>Allow for single FAIs in multiple-sheriffdom deaths and for all factors to be considered before deciding the location of an FAI</td>
<td>SG</td>
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<td>Decision or Proposal</td>
<td>Authority</td>
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<td>10</td>
<td>Lord Advocate have discretion to apply for an FAI when a person died abroad and body repatriated to Scotland</td>
<td>SG</td>
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<td>11</td>
<td>Written reasons to be provided to relatives when decided not to hold an FAI</td>
<td>COPFS</td>
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<td>12</td>
<td>Central FAI team led by an Advocate depute or senior prosecutor to oversee FAI resources, training and performance</td>
<td>COPFS</td>
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<td>13</td>
<td>Central team to track FAI cases and provide support</td>
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<td>14</td>
<td>Central team to maintain statistics relating to FAI cases</td>
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<td>15</td>
<td>Central team to ensure contact with COPFS</td>
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<td>16</td>
<td>Victim Information and Advice (VIA) officers to be trained in FAIs and bereavement</td>
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<td>17</td>
<td>Ensure FAIs held as promptly as possible after the death</td>
<td>COPFS</td>
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<td>18</td>
<td>Procurator fiscal (PF) to apply for FAI early on when a mandatory case and keep all parties informed of investigation</td>
<td>SG</td>
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<td>19</td>
<td>Hold a preliminary hearing in every case to ensure FAI is effective, fair and efficient</td>
<td>SG</td>
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<td>20</td>
<td>At the preliminary hearing the sheriff should fix the date for the commencement of the hearing of evidence, approve and settle the issues, and identify the extent to which any issues or matters are capable of being resolved</td>
<td>SG</td>
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<td>21</td>
<td>Copies of documents to be circulated prior to the preliminary hearing</td>
<td>SG</td>
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<td>22</td>
<td>Power to allow case to be transferred to a different court or sheriffdom</td>
<td>SG</td>
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<td>23</td>
<td>Relatives of the deceased should not have to justify the reasonableness of the granting of legal aid; and the limit should be increased for legal aid in FAIs</td>
<td>N/A</td>
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<td>24</td>
<td>Civil partners and cohabitants should be allowed to participate in an FAI the same as spouses</td>
<td>SG</td>
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<td>25</td>
<td>General provision for the receipt in evidence of a written statement, including an affidavit – the same as civil Ordinary Cause rules of evidence</td>
<td>SG</td>
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<td>26</td>
<td>There should be a comprehensive self-contained set of rules for FAIs</td>
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<td>27</td>
<td>Power for the sheriff to not hold part of the FAI in</td>
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<td>28</td>
<td>Sheriffs should use a standard form of determination with an agreed structure</td>
<td>SG Proposed Bill</td>
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<td>29</td>
<td>Clarify the meaning of section 6(1)(c) in legislation to ensure consistent interpretation of the test and use of hindsight</td>
<td>SG Proposed Bill</td>
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<td>30</td>
<td>Power for the sheriff to make recommendations to any body concerned with safety as well as a party of the FAI in order to prevent other similar deaths</td>
<td>SG Proposed Bill</td>
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<td>31</td>
<td>SCS website should contain all FAI determinations which are fully searchable</td>
<td>SG Proposed Bill*</td>
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<td>32</td>
<td>Duty on bodies subject to recommendations to make a written response to SG confirming steps taken to implement, if any, with reasons</td>
<td>N/A Not being taken forward**</td>
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<td>33</td>
<td>SG website to provide information on recommendations and response from bodies, including an annual report</td>
<td>N/A Not being taken forward</td>
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<td>34</td>
<td>Power for the sheriff to direct who receives a copy of the determination to ensure lessons learned</td>
<td>SG Proposed Bill*</td>
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<td></td>
<td>Fresh proceedings</td>
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<td>35</td>
<td>The Lord Advocate should have the power to re-open closed FAIs if new evidence is available and it is in the public interest</td>
<td>SG Proposed Bill</td>
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<td>36</td>
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* This proposal is being consulted on below in order to inform the best options, if any, and the way to implement the recommendation and to what extent.
**An alternative is proposed whereby the party subject to the recommendation would be obliged to make a written response to the sheriff confirming steps taken to implement or reasons why compliance has not taken place.

The Lord President supports Lord Cullen's recommendation that "in FAIs sheriffs and practitioners dispense with the wearing of wigs and gowns" and if implemented, this would mirror the current practice for civil appeals in the Inner House of the Court of Session.

The view of the SCS has not altered since the Scottish Government’s response to Lord Cullen’s recommendation that a sheriff with appropriate skills and experience to be assigned to a complex FAI. The efficient disposal of business in their sheriffdom is a statutory duty for sheriffs principal and in discharging that duty they will have regard to the need to ensure that the sheriff assigned to preside at an FAI has the skills and experience consistent with the complexity of the case.

The Judicial Institute for Scotland entirely endorses the recommendation of Lord Cullen in respect of judicial training. There has been a clear focus for such training in their programmes in recent years:

1. Sheriff Leslie, Ayr Sheriff Court, gave a paper ‘Fatal Accident Inquiries – Perspectives from the Crown and the Bench’ – delivered in conjunction with
Issma Sultan, Procurator Fiscal Depute, COPFS at the Complex Case Management Course, 17 October 2011.

2. Sheriff Principal Lockhart delivered a paper on FAIs at the Judicial Reasoning Course, 14 November 2011.

3. Mike Bell, Head of Scottish Fatalities Investigation Unit, COPFS presented a paper ‘The difficulties in running a Fatal Accident Inquiry’ at the North Strathclyde Sherifffdom Conference, 18 Nov 2011.


5. Sheriff Principal Pyle will deliver a paper on FAIs at upcoming Evidence Course, September 1-2 2014.

6. In anticipation of implementation of section 12 of the Coroners and Justice Act 2009 which came into force on September 24, 2012, a delegation of 12 sheriffs were sent to Warminster to undertake a conjoined two day training course with the British Military and Coroners in respect of FAIs following deaths of persons on active service abroad.

7. A dedicated one day course on military FAIs was delivered on 25 Jan 2012.

The Judicial Institute will continue to provide training in this important area and monitor developments with new legislation which will present further need and focus for this kind of specialist training.
CHAPTER 2: Mandatory categories of FAIs

Under current legislation, an FAI is mandatory for deaths as a result of an accident in the course of employment or in legal custody, including prison.

Lord Cullen made five recommendations in relation to the provision of mandatory FAIs. The Scottish Government agrees with the majority of these recommendations and will implement them through legislation.

Work-related deaths

The Government proposes maintaining the provision for mandatory FAIs into deaths that appear to have resulted from an accident occurring whilst working.

Patricia Ferguson’s consultation on her Inquiries into Deaths (Scotland) Bill proposes that there should be no distinction between deaths as a result of accidents in the course of employment (which currently trigger mandatory FAIs unless criminal proceedings are instigated and the Lord Advocate believes that those proceedings obviate the need for an FAI) and what is termed “other workplace incidents which lead to the death of a worker”.

This proposal seems to be intended to bring industrial diseases and other employment issues (such as exposure to chemicals, biohazards, etc) within the scope of the FAI legislation.

It is not clear, however, what purpose would be served by an FAI when the exposure causing the fatality may have been decades ago, at a work place that no longer exists, and where, in any event, the risks and dangers of that exposure are now fully known and understood. Deaths caused by industrial diseases are unlikely to be sudden or unexplained and it is likely that in a great many cases the victim or their family will be pursuing civil redress against the employer (before or after the death occurs).

This would also increase the number of FAIs, putting further pressure on the resources of COPFS and SCS, which would lead to increased costs.

Question 1. Do you think that the current mandatory provision for work-related deaths is sufficient?

Extending the mandatory categories

The Government agrees with Lord Cullen’s recommendation that the mandatory category of deaths of persons in ‘lawful custody’ should be updated and extended. It is proposed that the obsolete term ‘borstal institution’ should be replaced by ‘secure accommodation’.

The Government also agrees that if a person is ‘arrested or detained by police’ at the time of death they are effectively in ‘police care’ and in those circumstances a mandatory FAI should be carried out.
Question 2. Do you agree that a death which occurs when a person is ‘arrested or detained by police’ should be subject to a mandatory FAI?

The Scottish Government also agrees that the legislation should be amended to include the death of a child whilst in ‘secure care’.

The route into secure care would be either through conviction of a crime, when a child is below the age of 16 and some of these cases come to Scotland from elsewhere from the UK and the Republic of Ireland. Otherwise, the route into secure care is via a decision by a children’s hearing to put in place a compulsory supervision order (section 83(6) of the Children’s Hearings (Scotland) Act 2011) with authorisation for secure care. It is also possible for a child to be transferred to secure care, but a hearing would have to be held shortly after. Furthermore a child could have a warrant outstanding to secure attendance at a hearing which may or may not have authorisation for secure care (section 88).

Question 3. Should the death of a child in ‘secure care’ be subject to a mandatory FAI?

Lord Cullen’s recommendation for the extension of mandatory FAIs regarding deaths of children who are maintained in residential child care could include all children in private boarding schools, children in residential special schools and children placed in residential child care either via a compulsory supervision order made at a children’s hearing or voluntarily accommodated by the local authority under section 25 of the Children (Scotland) Act 1995, whether the death occurred on the grounds of such establishment or not.

FAIs are tremendously stressful times for all those involved, and are primarily useful when there are lessons to be learned and independent accountability is required to learn them; however this is not required in every case. None of the residential child care establishments can detain children within its premises against their will. In the Government’s view this proposal lacks a direct read-across with the other examples Lord Cullen mentions in seeking consistency for mandatory FAIs in cases of legal custody.

Question 4. Do you agree that any other categories of residential childcare, which are not defined as ‘secure care’, should not result in a mandatory FAI?

Lord Cullen also recommended the extension of mandatory FAIs to include the death of any person who is subject at the time of death to compulsory detention by a public authority within the meaning of section 6 of the Human Rights Act.

In its response to this recommendation the Government accepted the principle of an independent investigation for all deaths where a person has been detained by a public authority. However, it considers that there should continue to be some discretion to determine whether an FAI is appropriate in particular cases. The crucial distinction is between an independent investigation and a full judicially-led hearing in the form of an FAI.
The Government has identified options which would meet the desired aim of an independent investigation in all cases, and build on the existing system of Crown investigation of deaths, while avoiding some of the problems of mandatory FAIs in every such case. These include:

- An investigation by the procurator fiscal and exercise of discretion by the Lord Advocate on completion of that investigation to instruct a FAI; or,
- A case review investigation by a public authority (not the health board in whose area the death occurred), such as the Mental Welfare Commission or a different health board, combined with the continuation of the Lord Advocate's duty to investigate the death and a discretionary power to initiate an FAI.

**Question 5a.** Do you think the aim of an independent investigation into the death of a person subject to compulsory detention by a public authority, that retains the traditional role of the Lord Advocate, should be met by an investigation by the procurator fiscal and exercise of the Lord Advocate's discretion on completion of that investigation?

**Or**

**Question 5b.** Alternatively, do you think the option of a case review by a public authority such as the Mental Welfare Commission could be combined with a discretionary power to hold an FAI?

**Question 6.** What impact do you think that the proposals in relation to the mandatory categories of FAIs will have on you, your organisation or community?
CHAPTER 3: Deaths abroad

Under the current legislation, there is no provision to hold an FAI into the death of a person domiciled in Scotland who dies abroad, even if the body is repatriated to Scotland.

In England and Wales, a coroner who is made aware that the body of a deceased person is within that coroner's area must, as soon as practicable, conduct an investigation into the person's death if:

- the deceased died a violent or unnatural death;
- the cause of death is unknown; or
- the deceased died while in custody or otherwise in state detention.

This applies even where the death occurs abroad, but the body has been repatriated to the area of a particular coroner.

Recommendations

Lord Cullen expressed the view that it would be unjustifiable to hold mandatory FAIs into the deaths of all Scots who happen to die or are killed abroad.

Lord Cullen recommended, however, that, where the body of a person domiciled in Scotland who dies abroad is repatriated, an FAI should be held at the discretion of the Lord Advocate and that the Lord Advocate should consider “whether there had been circumstances which called for investigation, whether there had been a satisfactory investigation [in the country where the death took place] and whether there was a prospect of an FAI yielding significant findings.”

Lord Cullen thought that, out of respect for the investigating authorities in the foreign jurisdiction, such discretion might be exercised rarely.

In cases where the death occurs in a jurisdiction where there are sophisticated, well-resourced forces of law and order the investigatory authorities can be relied upon to conduct a thorough investigation of the death therefore there does not seem to be a strong argument for holding an FAI into a death. On the other hand, if the forces of law and order are not sophisticated or reliable, it is difficult to see how COPFS could conduct a satisfactory investigation of the death from Scotland in the absence of any powers to require foreign witnesses to give evidence or to demand the submission of evidence from the country where the death took place.

The Government noted in its response that it agreed in principle with the recommendation that it should be possible to hold an FAI into the death of a Scot abroad where the body was repatriated to Scotland, albeit there would have to be strict criteria about the circumstances in which an FAI would be carried out by Scottish authorities. Lord Cullen gave some suggestions of matters that would be relevant for consideration by the Lord Advocate.

If FAIs are instructed at the discretion of the Lord Advocate for deaths of Scots abroad, there is likely to be liaison with embassies and consulates abroad to enable
the FAI to be conducted. Liaison with embassies and consulates can add substantial time and costs to a process. However, as such discretion might be exercised rarely, it is thought that any costs associated with liaison with embassies could be met from existing resources.

There is no proposal to hold FAIs into deaths in other parts of the United Kingdom (UK). The system of coroners’ inquests may be relied upon to conduct thorough investigations into deaths of Scots in England, Wales or Northern Ireland.

There will be significant practical and resource implications for COPFS in investigating a death which took place outwith Scotland and the UK, since they will have no powers to require foreign witnesses to attend the inquiry or to require the submission of evidence from a foreign country.

For all of these reasons, it is proposed that the power to hold an FAI into the death of a person domiciled in Scotland who dies or is killed abroad should be at the discretion of the Lord Advocate and should only apply where the body is repatriated to Scotland.

**Question 7. Should the Lord Advocate have discretion to hold an FAI into the death of a person domiciled in Scotland who dies abroad where the body is repatriated to Scotland?**

**Question 7a. If you answered ‘yes’ to question 7, should the criteria to consider include:**
- whether there had been circumstances which called for investigation,
- whether there had been a satisfactory investigation [in the country where the death took place]; and
- whether there was a prospect of an FAI yielding significant findings?

**Question 7b. If you answered ‘no’ to any of the criteria in question 7a, please provide reasons for your answer.**

**Question 8. What impact do you think this proposal will have on you, your organisation or community?**

**Deaths of Scottish domiciled service personnel abroad**

Legislation was commenced at Westminster in September 2012 to permit FAIs to be held in Scotland into deaths of Scottish domiciled service personnel abroad. This is provided for in sections 12 and 50 of the Coroners and Justice Act 2009 and section 1A of the Fatal Accidents and Sudden Deaths (Scotland) Act 1976. The Scottish Government worked closely with the Ministry of Defence (MoD), the Ministry of Justice (MoJ) and COPFS about this legislative change when it was enacted and also in the run-up to commencement.

The interests of bereaved relatives are at the heart of this legislative change. In appropriate cases, each military fatality where there are known links to Scotland will be the subject of discussion between the offices of the Secretary of State for Defence and the Lord Advocate. Where affected families intimate that they wish the death of
their loved one to be considered at an FAI in Scotland, instead of at a coroner’s inquest in England and Wales, it is expected that an FAI will be held. The Lord Advocate will then decide in which sheriffdom the FAI should be held and undertake the investigation towards that inquiry.

In such circumstances, although the Lord Advocate still technically has discretion as to whether an FAI should be carried out, the transfer of responsibility from the authorities in England and Wales is made on the expectation that such an inquiry will be held. It is MoD policy that all military deaths should be investigated either by a coroner’s inquest or by an FAI.

**First Scottish military death since legislation was commenced**

When the first Scot was killed after the commencement of the legislation, as with all deaths of military service personnel who die abroad, the initial investigation of the death was carried out by the Special Investigation Branch of the Royal Military Police. Once this was completed, the views of the bereaved family were sought on whether they wished an FAI to be held in Scotland. They declined the offer and a coroner’s inquest was held in Oxford.

Nevertheless the Government believes that it is right that it should be possible for the deaths abroad of Scottish domiciled service personnel to be investigated in Scotland under the FAI system in order that bereaved families do not have to travel to attend a coroner’s inquest in England.
CHAPTER 4: Delays

There has been some criticism in recent years in relation to what are seen as unacceptable delays in holding FAIs. The main concern has been about the time between a death and the resulting FAI taking place. Other concerns appear to be about the length of time to conduct an FAI. Lord Cullen noted in his Review that “delay is not only distressing and frustrating for the relatives of the deceased. It also creates the risk of the loss or deterioration of evidence”.

Carrying out thorough investigation is the only way to ensure proper decisions can be reached on whether or not to hold an FAI. COPFS have indicated that they will not compromise thoroughness for speed, however, the Law Officers have indicated that they share the public’s concern about the length of time it can take to hold an FAI and believe more can be done to reduce delays in investigations.

Although many of the delays in the FAI process are outwith the control of the Crown, the Law Officers recently ordered a review into the Crown’s internal FAI process in an attempt to identify ways of shortening the process within COPFS. Strict timescales have now been set for specific outstanding cases to ensure that court proceedings are initiated as soon as possible after a decision is taken to hold an FAI.

Delays between the date of death and the start of an FAI

Investigating deaths is a highly sensitive and complex area of work, and it is vital that procurators fiscal investigate deaths thoroughly and professionally. Incidents resulting in FAIs are likely to involve consideration of criminal proceedings and/or lengthy expert investigations by regulatory authorities.

The length of time taken to investigate will vary depending on the individual circumstances of each case. Very often the Crown will require to instruct an independent expert report (to comply with Article 2 of ECHR (Right to life)) and, where such a report is required, the instructing, obtaining and consideration of it will take months and may take longer. As any such investigation is, to a certain extent, informed by expert opinion then the requirement to obtain the expert report, delays the holding of an FAI by significant periods of time, which is to a large extent out with the control of the Crown.

The holding of an FAI may sometimes be delayed by the need, for example, to conduct a criminal investigation or an investigation by the Health and Safety Executive or an Accident Investigation Branch. The Crown’s role can only begin after other agencies have completed their enquiries which means COPFS do not have control of the entire process.

Following any such inquiry referred to above, a decision then has to be taken as to whether criminal proceedings are appropriate or whether an FAI is required (in circumstances where this is discretionary). Under the current legislation, it is open to the Lord Advocate to decide that it is unnecessary to hold an FAI if the

4 http://www.echr.coe.int/Documents/Convention_ENG.pdf
circumstances of the death have been sufficiently established in criminal proceedings.

The time lapse until the holding of the FAI will inevitably be longer where there are complex and difficult issues to be considered.

In recent times there was considerable criticism over the delay of nearly five years between the Super Puma helicopter crash in April 2009 and the holding of the FAI in Aberdeen in January 2014.

Other factors that contribute to delays may include availability of accommodation and sheriffs, and time-consuming preparation for a complex inquiry, including finding expert advice.

It is significant, however, that Lord Cullen did not recommend time limits due to the diversity of FAIs. The reasons were provided at paragraph 6.14 of Lord Cullen’s Review.

Lord Cullen commented in a letter to Kenny MacAskill, the Cabinet Secretary for Justice in January 2014:

“It is plainly not practical or realistic to make it mandatory that an FAI must open within a certain period of the date of the death of the deceased. That is because of the diversity and potential complexity of the cases, and because other investigations or proceedings may have to be completed first.”

In paragraph 6.14 of his Review, Lord Cullen did recommend that COPFS review its use of resources to ensure that FAIs are held as soon as possible after the death.

In December 2013 the Lord Advocate instructed SFIU that a petition (request for an FAI to take place) should be made to the relevant court within two months of the procurator fiscal receiving Crown Counsel’s instructions to hold an FAI.

The Government believes that this will have the effect of speeding up the commencement of FAIs. The Government agrees with Lord Cullen that time limits would not be practical due to the diversity and complexity of FAIs.

**Question 9. Do you agree with Lord Cullen’s view that “it is plainly not practical or realistic to make it mandatory that an FAI must open within a certain period of the date of the death of the deceased... because of the diversity and potential complexity of the cases” which may mean that an incident is not properly investigated?**

**Preliminary hearings**

Lord Cullen recommended that a preliminary hearing should be heard in each case to ensure that the FAI achieves its objective of determining the circumstances of the death and doing so in a manner which is fair, expeditious and effective.
It is proposed that preliminary hearings should become standard practice unless the sheriff dispenses with it if, for example, not much evidence is expected to be led and the outcome of the FAI is likely to be purely formal. SCS supports the use of preliminary hearings in all FAIs as a mechanism to estimate the length of time required for court hearing days in order to ensure suitable hearing dates and accommodation facilities are allocated.

Some FAIs are adjourned due to lack of court capacity, usually due to competing criminal business. This seems to have been largely addressed by the practice in Edinburgh and Glasgow of the sheriff holding a preliminary hearing. The Government considers the introduction of preliminary hearings in Glasgow and Edinburgh Sheriff Courts a good practice and supports the extending the practice for all FAIs in Scotland.

Question 10. Do you agree that preliminary hearings should be held to help speed up the process of FAIs?

COPFS response to Cullen Review

Most of Lord Cullen’s recommendations (12 to 17) which would speed up death investigations have already been implemented by COPFS.

The following actions have been implemented in response to those recommendations:

- The Scottish Fatalities Investigation Unit (SFIU), was established in 2010 initially to oversee and provide advice, support and expertise to procurators fiscal investigating deaths across Scotland. The aim of SFIU is to ensure that all death reports are prepared according to the highest possible standards; that policy and practice in the investigation of deaths is applied consistently; and that appropriate and timely decisions are taken throughout the life of these cases.
- It is also the central point for liaison with the nearest relatives of the deceased’s family and for providing them with reasons where the Lord Advocate decides not to apply for an FAI, either verbally or in writing depending on what method of communication is most appropriate in the circumstances.
- In April 2012 the structure of SFIU was changed with offices in the North, West and East with the central team becoming the SFIU National team. The SFIU National team, headed by a senior prosecutor as recommended by Lord Cullen, liaises with Crown Counsel (Recommendations from paragraphs 3.44 and 6.14). SFIU now have responsibility for overseeing the progress from the outset in all cases for which an FAI is mandatory or in respect of which it seems likely that exercise of the Lord Advocate’s discretion to petition for such an inquiry will be recommended.
- A database of cases is held by SFIU for internal use which differentiates between mandatory and discretionary FAIs and records relevant dates and detail in order to track the progress and timings of cases and to maintain statistical data. SFIU have also compiled details of suitable experts to whom procurators
fiscal can be referred which is updated on a regular basis.
(Recommendations from paragraph 6.15 and 6.17)

- SFIU has re-prioritised current death investigations to ensure those awaiting resolution for some time are expedited and new timescales have been established for SFIU to conclude each investigation. This will contribute to reducing unnecessary delays in the investigation of deaths, some of which may lead to an FAI. (Recommendation from paragraph 6.14)

- SFIU offices in the North, West and East provide a contact point for information to relatives on the investigation of deaths by the procurator fiscal. There is Victim Information and Advice (VIA) support available to the offices. (Recommendation from paragraphs 6.56 and 6.57)

**Other options to speed up FAIs**

A further recommendation made by Lord Cullen which would impact on the perceived delays in holding FAIs is for the procurator fiscal to apply for an FAI at an early stage after the death in mandatory cases, so that the sheriff, the relatives and other interested parties can be informed as to the state of the investigation, the expected timescale for the FAI and any factors likely to affect progress.

The Government agrees with this recommendation with the proviso that enough time is allocated to gathering the information required to determine whether an FAI will be held or not. Relatives should be kept informed of progress at regular intervals to avoid further stress to them.

The Government is looking to implement the use of video links as well as clarifying that hearsay evidence is admissible at an FAI.

Other suggestions for expediting FAIs being considered by the Government:

- The system of coroners’ inquests permits the submission of statements in writing to the coroner which he/she can consider in advance of the hearing – in order to speed up matters. Consideration is being given to permitting the submission of statements in advance to the sheriff.
- Pre-hearing meetings of experts to identify agreed points and points of disagreement.
- Some business might be dealt with by the sheriff in chambers such as admission of statements.

Lord Cullen has also recommended that a sheriff principal should be able to transfer an FAI to a different sheriffdom if this is thought appropriate and particularly if it may speed up the holding of an FAI.

**Question 11. Will having pre-hearing meetings of experts speed up FAIs?**

**Question 12. Will hearing some business in sheriffs’ chambers help speed up FAIs?**
Question 13. Do you agree the proposal of permitting the submission of statements to the sheriff in advance of the FAI?

Question 14. Should the sheriff principal be able to transfer the case to a different sheriffdom (area) if this is thought appropriate and if it may speed up the holding of the FAI?

Question 15. What impact do you think that the proposals to speed up FAIs will have on you, your organisation or community?
CHAPTER 5: Fatal Accident Inquiry accommodation

Lord Cullen recommended that FAIs could be taken out of court buildings into other accommodation more suitable for such proceedings. He recommended that an FAI should, where possible, not be held in a sheriff courtroom but in other appropriate premises; and, where it is unavoidable that the FAI should be held in a courtroom, care should be taken to select one which, along with its ancillary facilities, such as waiting rooms, has the least connection with criminal proceedings. Such centres would be much more acceptable to bereaved families as there would be a more relaxed atmosphere.

Lord Cullen’s recommendation was primarily directed at the SCS who have the statutory responsibility for making arrangements for court cases, including FAIs. In its response the Government suggested that alternative accommodation, such as that operated by the Scottish Tribunals Service (STS), might be suitable for FAIs at a cost which is acceptable to SCS. SCS and STS are now to merge under the provisions of the Courts Reform (Scotland) Bill and so the estate of the STS will become part of the new Scottish Court and Tribunals Service (SCTS).

At present, under section 1(1) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, “the procurator fiscal for the district with which the circumstances of the death appear to be most closely connected shall investigate those circumstances and apply to the sheriff for the holding of an inquiry” and FAIs must be held within that sheriffdom. The removal of this restriction is proposed, so that an FAI may be held in the most appropriate accommodation in any sheriffdom.

It has therefore been proposed that the opportunity might be taken to address these concerns and difficulties by using ad hoc accommodation or by setting up dedicated FAI centres.

Ad hoc accommodation for FAIs

SCS have previously managed to hold larger, long running FAIs outwith court buildings, such as the FAI into the 2009 Super Puma crash which was held in the Council Chamber of Aberdeen City Chambers. The use of ad hoc accommodation by the SCS might be extended and locations with suitable resources are being considered. One advantage of the use of these premises would be that FAIs would be taken out of court rooms, which would meet one of Lord Cullen’s recommendations and would also benefit court programming.

FAIs which relate to deaths in rural or remote parts of Scotland could continue to be held locally. This would mean that bereaved families and witnesses would not have to travel longer distances to attend the FAI, and, given that there is less pressure on court programmes in remote locations, there will be less cause for delay.

The major advantage of holding longer and more complex FAIs in dedicated ad hoc accommodation is that there are less competing demands which need to be taken into account. The provision of information from the Crown at an early stage would also assist the planning of appropriate accommodation provision by SCS.
A balance would need to be achieved between the timescale when an FAI can proceed and any inconvenience for family members and witnesses in travelling to a different location.

**Fatal Accident Inquiry Centres**

Another possibility which has been proposed is that all FAIs in Scotland might be held in dedicated centres. This would mean that they would always be available and there would be no competing business that would need to be taken into account. The establishment of such centres would meet Lord Cullen’s recommendation that FAIs should be taken out of courtrooms. There would, of course, be cost and funding implications in establishing such centres which would need to be balanced against the benefits. Consideration would need to be given to the accommodation for shorter FAIs where a dedicated centre is committed to a longer-running FAI.

The proposal is that there would be three such centres, one in the North of Scotland, one in the East and one in the West. This is likely to mean that families and witnesses will have to travel further than to their local sheriff court but, as with the proposal for ad hoc locations, the major advantage of holding FAIs in bespoke accommodation would be to provide an out of court room environment in line with Lord Cullen’s recommendations, and ensuring that there would be no competing business demands which need to be taken into account. The increasing use of video technology could also reduce the requirement to travel.

If the centres were not fully utilised for FAIs, then they would become available for other kinds of Government business. An alternative option might be to accommodate dedicated FAI facilities within wider integrated justice centres. Consideration would need to be given to the allocation of judiciary to FAI centres, including whether there would be justification for specialist sheriffs dealing with FAIs. This would be a matter for the Lord President.

**Question 16.** Do you agree with the proposal that the majority of FAIs should be dealt with in ad hoc locations, but FAIs which relate to deaths in rural or remote areas should still be dealt with in local sheriff courts?

**Question 17.** Do you think that all FAIs in Scotland should be held in three bespoke, dedicated centres?

**Question 18.** What impact do you think that the use of FAI centres, or taking FAIs out of sheriff courts, would have on those attending FAIs?
CHAPTER 6: Sheriffs’ recommendations

In an FAI, it is the role of the sheriff to determine the time, place and cause of death and the circumstances surrounding it. The sheriff can also make recommendations as to how deaths in similar circumstances may be avoided in the future, and this happens in around a third of all FAIs. These recommendations can be used to learn lessons in the public interest.

Determinations

Lord Cullen recommended that sheriffs should use a standard structure for determinations to provide clarity and assist comparisons between cases. He felt that a consistent form could enhance the status of determinations and provided a suggested structure at paragraph 8.6 of his report.

The Government agrees that determinations issued by sheriffs at the conclusion of FAIs should be in a standard form and that this should be provided in the rules governing FAIs.

Lord Cullen did not discuss timescales for issuing determinations or making them available publicly. This is a matter for the Lord President. In the report of the Scottish Civil Courts Review, it is suggested that a judgment be delivered within three months unless for a complex case.

Enforcement of sheriffs’ recommendations

The issue of the enforcement of sheriffs’ recommendations was considered in the context of Patricia Ferguson’s proposed Inquiries into Deaths (Scotland) Bill. In the accompanying documentation to her Members’ Bill, Ms Ferguson claimed that the recommendations made by sheriffs at the conclusion of FAIs are often ignored at present. For that reason she proposed that the recommendations should be legally binding.

However, despite criticism from some families, COPFS advise that the general experience is that, where sheriffs do make recommendations, they are passed on to the relevant authorities and are taken very seriously – there is no evidence that sheriff’s recommendations are not being acted upon. Often remedial action has been taken by the time the inquiry is held.

There would be other practical difficulties in making a sheriff’s recommendations legally binding. For example, what would the sanction be? Criminal or civil? There may already be civil proceedings in prospect following a fatal accident and COPFS will consider whether criminal proceedings are appropriate before any FAI is instructed.

The Government believes that the present system offers flexibility – some recommendations may have wider implications which need to be considered in a broader context, while others may only be relevant to the circumstances of that case.
Lord Cullen did not recommend that sheriffs’ recommendations should be legally binding. He did recommend that the entity or body to whom a recommendation is directed should be under a duty to make a written response to the Scottish Government (within a period set by the sheriff) stating whether and to what extent it has implemented, or intends to implement, the recommendation or, if not, for what reason or reasons. Where implementation is stated as intended, Lord Cullen thought that there should be a further duty thereafter to confirm its implementation.

Under the existing legislation Scottish Ministers have no powers to enforce recommendations made at FAIs, which are not in any case legally binding on the parties to whom they are addressed. This is the responsibility of the bodies and agencies to which the sheriff addresses his recommendations, and that the Government expects them to accept that responsibility and take appropriate action.

The Government has serious reservations as to the practicality of the Government actively monitoring the implementation of recommendations. As the recommendations are not legally binding, the Government does not have, and should not have, a role in monitoring or enforcement.

The main reasons why this is not practical are:

- The recommendations of the sheriff at the conclusion of the FAI may be unique to the circumstances of that case.
- What is appropriate in one case may not be in another.
- There may be very legitimate reasons not to do what the sheriff recommends (unintended consequences)
- There may be other / better ways to achieve the same result.
- Frequently recommendations refer to working practices which require interpretation on the ground, and it is hard to see how the Government could be in a position to assess compliance in such circumstances.
- In other cases, and perhaps particularly in medical cases and the recent accidents involving helicopters, the circumstances and therefore the recommendations of the sheriff, may be very complex and technical, and monitoring implementation would not be possible without specialist knowledge.
- There might be considerable resource implications in undertaking to follow-up recommendations since that may require a sustained effort over a potentially long period of time in trying to establish whether or not an organisation has complied with a sheriff’s recommendations. This could be very time-consuming.

The Government agrees that lessons from FAIs should be learnt and acted upon, but does not believe that this recommendation is the best way to achieve the aim. The approach would be overly bureaucratic and would not always have the desired effect.

After further consideration it now appears to the Government that the sheriff who listened to all of the evidence at the FAI should be the person who instructs the dissemination of the recommendations (if any) set out in their determination to those parties to whom they are addressed and any appropriate regulatory bodies. This is
not a role that the courts have had in the past, but how this might work is shown below under “Legislative proposals”.

**Disseminating recommendations**

The Government disagreed with Lord Cullen’s recommendation that the Scottish Government webpage should be revived and updated to show the text of sheriffs’ recommendations, to whom it was directed and its reasons, with a link to the full text of the determination on the SCS website. The Government concluded that findings are better disseminated through the SCS website. It was also not persuaded of the value of an annual report covering the diverse range of matters which may be considered by FAIs in any particular year.

Lord Cullen’s recommendation - that the SCS website should contain all FAI determinations and be fully searchable - is being considered. This will allow published determinations relating to specific subjects, dates or locations to be searched. Text can be redacted to ensure that the identity of individuals is protected. Changes to the SCS website are ultimately a matter for the SCS and this recommendation has been partly implemented. Following development of the SCS website in 2012, published FAI determinations are fully searchable and a specific search can be undertaken solely on FAI determinations. It is at the sheriff’s discretion whether the determination should be anonymised and, for such determinations, a redaction process operates prior to their publication on the SCS website.

**Question 19. Should it be mandatory for all FAI determinations, subject to redaction, to appear on the SCS website and be fully searchable?**

**Practice after Coroner’s Inquests**

The recommendations from coroners’ inquests are not legally enforceable. Under schedule 5 of the Coroners and Justice Act 2009, which applies to coroners’ inquests in the rest of the UK, if, in the opinion of the coroner, action should be taken to prevent the occurrence or continuation of such circumstances creating a risk of other deaths, or to eliminate or reduce the risk of death created by such circumstances, the coroner must report the matter to the person who seems to have the power to take the appropriate action. That person must make a written response to the coroner, but they are not obliged to comply with the coroner’s recommendation and may simply explain why they have not complied.

MoJ did not consider alternative approaches to these “Preventing future deaths” (PFD) reports. Consultation respondents appeared happy with the proposed regulations.

**Legislative proposals**

Lord Cullen has recommended that legislation should clarify and/or say more about what ‘reasonable precautions whereby the death and any accident resulting from the death might have been avoided’ sheriffs may recommend. He also recommended
that the sheriff should be able to direct recommendations at specific people or bodies and should have a power to direct delivery of the FAI determination to certain people.

If these recommendations were implemented it would therefore ensure that sheriffs, rather than the Government, are responsible for recommendations made at the conclusion of an inquiry being directed to relevant parties and sheriffs would also be obliged to send a copy of their determination to any relevant body concerned with safety in the industry or activity in which the accident took place.

If a party were in breach of Health and Safety regulations, that would be a matter for civil proceedings or prosecution.

Although not considered by Lord Cullen, it would be possible to legislate to require parties to whom sheriffs’ recommendations have been addressed to be obliged to respond to the sheriff who presided over the FAI in a manner similar to procedures used by coroners at the conclusion of inquests. The advantage of this would be that the sheriff would be familiar with the circumstances of the incident which resulted in the FAI and would therefore be able to judge whether the party had responded in an appropriate manner, particularly if the party has indicated that they have not complied with a sheriff’s recommendation. There may, however, be good reasons for non-compliance.

As previously noted, the Government agrees that it would not be appropriate to make recommendations legally binding. So, on balance, the requirement to respond to a recommendation, but not necessarily do what it says, seems appropriate. It fosters accountability on the part of the recipient for whatever they decide to do in response.

**Summary**

The Government does not believe that it would be appropriate for sheriffs’ recommendations to become legally binding on parties to whom they are addressed. As noted above, there may be very good reasons for non-compliance.

The public interest in FAIs is served by establishing whether there are precautions or changes in practice which may prevent deaths in similar circumstances in the future. It is a matter for civil proceedings as to whether there has been negligence which led to the death.

The Government’s response to the Review proposed that findings are disseminated on the SCS website.

The Government does, however, think that it may be possible to:

(a) place a duty on sheriffs to ensure that any recommendations which they make at the conclusion of a fatal accident inquiry are disseminated to any party to the inquiry and any relevant body concerned with safety in the industry or activity in which the accident took place; and
(b) oblige parties to whom sheriffs’ recommendations are addressed to respond to the sheriff who presided over the FAI indicating what action had been taken, though those parties would not be obliged to comply with the sheriff’s recommendations. If they have not complied, they would be obliged to explain why not.

This would bring the law in relation to sheriffs’ recommendations at the conclusion of inquiries into line with what happens after coroners’ inquests in the rest of the U.K.

Question 20. Do you think that sheriffs should instruct the dissemination of their recommendations (if any) to the parties to whom they are addressed and any appropriate regulatory bodies?

Question 21. Do you agree that parties to whom sheriffs’ recommendations are addressed should be obliged to respond to the sheriff who presided over the FAI indicating what action had been taken? This would be on the basis that those parties would not be obliged to comply with the sheriff’s recommendations, but if they have not complied they would be obliged to explain why not.

Question 22. What impact do you think that the proposals regarding sheriffs’ recommendations will have on you, your organisation or community?
CHAPTER 7: Legal aid for bereaved relatives

During an FAI, the procurator fiscal is independent and represents the public interest.

As indicated earlier, the purpose of an FAI is to investigate the circumstances of death in the public interest in order to try to avoid any future incident of the same kind. The procurator fiscal leads evidence to establish the cause of death.

Procurators fiscal thus have a public duty to fulfil at the inquiry. They will meet with the family to discuss what witnesses and evidence they intend to produce and what questions they intend to ask. Often the fiscal will ask the family if there are any particular questions that they wish to be answered.

Families may have questions which the fiscal does not feel that it would be appropriate for them to ask since they are representing the public interest. In such cases they may consider that they require their own legal representative, particularly where a death occurs in legal custody as the investigation would be conducted by an agent of the State.

If the family cannot afford to pay for such legal representation, they may be eligible to receive legal aid. The Scottish Legal Aid Board can make legal aid available where a person entitled to be represented at an FAI can show that they have concerns which the procurator fiscal is not going to raise at the FAI.

Legal aid is available for relatives participating in FAIs on the same basis as for civil proceedings. An application for legal aid is approved by the Scottish Legal Aid Board (SLAB) based on probable cause, reasonableness and financial eligibility. In terms of the 'reasonableness' test, SLAB states that applications “should focus on why the applicant needs separate legal representation at the FAI” (Civil Legal Assistance Handbook, Chapter 13.88.).

Whether a fatal accident inquiry is ultimately instructed following a death, the nearest relatives are given the opportunity to be fully engaged in the investigative process. Nearest relatives are provided with the opportunity to meet with the procurator fiscal to raise any concerns or issues that they may have regarding the circumstances of the death. This process can sometimes lead to an additional investigation being undertaken by the procurator fiscal to address such concerns.

Relatives bereaved by homicide, road traffic incidents and in circumstances likely to lead to a mandatory fatal accident inquiry are supported by the COPFS Victim Information and Advice (VIA) service.

VIA staff will provide general information to immediate relatives about the process of deaths investigation and fatal accident inquiry procedures. They will provide case-specific information about the progress of the investigation and Inquiry and can facilitate referral to local support agencies.
Recommendations for legal aid

In his Review Lord Cullen indicated that the representation of relatives at an FAI should be regarded as a special case. For this reason Lord Cullen recommended that the test of ‘reasonableness’ for the granting of legal aid for FAIs should be removed for relatives of the deceased, and that the Scottish Ministers should consider increasing the limit for legal aid in FAIs and the extent to which legal aid is available within that limit.

The Scottish Government does not agree with this recommendation and believes that existing statutory tests should continue to apply. While we regard it as important that relatives should be able to participate appropriately in FAIs we do not accept that this requires automatic legal representation in every case.

This view is reinforced by the fact that, in the current financial climate, it has been necessary to reduce overall legal aid expenditure significantly. Ministers are determined to do this in a way which maintains access to justice as far as possible, and do not believe that removing a test of reasonableness specifically for FAIs would contribute to this aim. All civil legal aid applications need to meet the statutory tests of probable cause and reasonableness. Furthermore, extending assistance to those of greater means would reduce the amount available to those who have less.

The Scottish Legal Aid Board has published guidance explaining the current approach taken when assessing reasonableness in these applications.

Since it is for the procurator fiscal to investigate the circumstances of a sudden death, there must be a clear basis for a relative of the deceased requiring their own publicly funded legal representation. The basis of this approach is rooted in the function of the FAI itself, namely that it is a fact finding exercise, and not one which seeks to apportion blame or fault.

Notwithstanding, the reasonableness test is likely to be met if a relative can demonstrate that they have a discernible interest that is unlikely to be subject to investigation by the procurator fiscal, necessitating that they have their own legal representation.

Lord Cullen also specified that legal aid should be granted in any case where the participation of the relatives is necessary in order to comply with Article 2 of the European Convention on Human Rights (ECHR).

When an FAI is investigating a potentially unlawful killing by agents of the State, or as outlined above, a death in legal custody, then we accept that it will be generally appropriate for relatives of the deceased to secure independent legal representation. Accordingly, the tests of probable cause and reasonableness should be easy for an applicant to satisfy. This is a matter for SLAB to take into account when granting legal aid for FAIs and does not require to be addressed further in legislation.

Question 23. Do you agree that the existing arrangements for legal aid for bereaved relatives at FAIs should remain?
Question 23a. If you answered ‘no’ to question 23, in what ways would you change the arrangements for legal aid for bereaved relatives?

Question 24. What impact do you think this proposal will have on your, your organisation or community?
CHAPTER 8: responding to this consultation paper

We are inviting written responses to this consultation paper by Tuesday 9 September 2014.

There are a number of consultation questions on which the Scottish Government would welcome views. Please do not feel obliged to answer all the questions. Equally, if you would like to comment on any other aspects of the proposals, the Scottish Government would welcome your views.

We would be grateful if you could use the separate consultation questionnaire provided to answer the questions posed throughout the consultation paper. The questions appear in full in the consultation questionnaire at Annex B and on the downloadable consultation response form (for electronic completion).

Please send your completed consultation questionnaire and Respondent Information Form (see "Handling your Response" below) to:

FAIconsultation@scotland.gsi.gov.uk

or

Civil Law and Legal System Division
Justice Directorate
Scottish Government
GW.15 St Andrew’s House
Regent Road
Edinburgh
EH1 3DG

If you have any queries contact Marisa Strutt on 0131 244 3311.

We would be grateful for responses to be completed electronically and sent by email where possible. This will aid handling and analysis of all responses to inform the Bill.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at http://www.scotland.gov.uk/consultations. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Government now has an email alert system for consultations (SEconsult: http://www.scotland.gov.uk/consultations/seconsult.aspx). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.
Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** (at Annex A and on the downloadable consultation response form) which forms part of the consultation questionnaire as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library. (See the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library and on the [Scottish Government consultation](#) web pages by 14 October 2014. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the terms of amending Fatal Accident Inquiry legislation. We aim to issue a report on this consultation process by the end of the year. The Bill will be introduced as soon as an opportunity arises in the legislative programme.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to **Marisa Strutt** at the above address.
CHAPTER 9: The Scottish Government consultation process

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (eg, analysis of response reports) can be accessed at: Scottish Government consultations (http://www.scotland.gov.uk/consultations)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

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5 http://www.scotland.gov.uk/consultations
CONSULTATION ON PROPOSALS TO REFORM FATAL ACCIDENT INQUIRIES LEGISLATION

ANNEX A - RESPONDENT INFORMATION FORM

Please Note this form must be returned with your response to ensure that we handle your response appropriately. A Word version is available to download for completion electronically as part of the consultation response form. This consultation closes on Tuesday 9 September 2014.

1. Name/Organisation

Organisation Name

Title  Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname

Forename

2. Postal Address


Postcode  Phone  Email

3. Permissions - I am responding as…

Individual  /  Group/Organisation  Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate  Yes  No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

Yes, make my response available, but not my name and address

Yes, make my response and name available, but not my address

(c) The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your response to be made available?

Please tick as appropriate  Yes  No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so.

Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate  Yes  No
ANNEX B

CONSULTATION QUESTIONNAIRE

If answering questions by hand on a printed copy, you may provide comments on a separate sheet of paper to be returned with completed annexes A-C to the address on page 33. We would, however, be grateful for responses to be completed electronically using the downloadable consultation response form and returned by email where possible as it will aid handling and analysis of all responses.

Mandatory categories of FAIs

Question 1:
Do you think that the current mandatory provision for work-related deaths is sufficient?

Yes ☐ No ☐

Comments

Question 2:
Do you agree that a death which occurs when a person is ‘arrested or detained by police’ should be subject to a mandatory FAI?

Yes ☐ No ☐

Comments

Question 3:
Should the death of a child in ‘secure care’ be subject to a mandatory FAI?

Yes ☐ No ☐

Comments

Question 4:
Do you agree that any other categories of residential childcare, which are not defined as ‘secure care’, should not result in a mandatory FAI?

Yes ☐ No ☐

Comments
Question 5a:
Do you think the aim of an independent investigation into the death of a person subject to compulsory detention by a public authority, that retains the traditional role of the Lord Advocate, should be met by an investigation by the procurator fiscal and exercise of the Lord Advocate’s discretion on completion of that investigation?

Yes □ No □
Comments

Or

Question 5b:
Alternatively, do you think the option of a case review by a public authority such as the Mental Welfare Commission could be combined with a discretionary power to hold an FAI?

Yes □ No □
Comments

Question 6:
What impact do you think that the proposals in relation to the mandatory categories of FAIs will have on you, your organisation or community?

Comments

Deaths abroad

Question 7:
Should the Lord Advocate have discretion to hold an FAI into the death of a person domiciled in Scotland who dies abroad where the body is repatriated to Scotland?

Yes □ No □
Comments

Question 7a:
If you answered ‘yes’ to question 7, should the criteria to consider include:

(i) Whether there had been circumstances which called for investigation

Yes □ No □

(ii) Whether there had been a satisfactory investigation (in the country where the death took place)

Yes □ No □
(iii) Whether there was a prospect of an FAI yielding significant findings

Yes ☐ No ☐

Question 7b:
If you answered 'no' to any of the criteria in question 7a, please provide reasons for your answer

Comments

Question 8:
What impact do you think this proposal will have on your, your organisation or community?

Comments

Delays

Question 9:
Do you agree with Lord Cullen’s view that “it is plainly not practical or realistic to make it mandatory that an FAI must open within a certain period of the date of the death of the deceased… because of the diversity and potential complexity of the cases” which may mean that an incident is not properly investigated?

Yes ☐ No ☐

Comments

Question 10:
Do you agree that preliminary hearings should be held to help speed up the process of FAIs?

Yes ☐ No ☐

Comments

Question 11:
Will having pre-hearing meetings of experts speed up FAIs?

Yes ☐ No ☐

Comments
Question 12:
Will hearing some business in sheriffs' chambers help speed up FAIs?
Yes ☐ No ☐
Comments

Question 13:
Do you agree the proposal of permitting the submission of statements to the sheriff in advance of the FAI?
Yes ☐ No ☐
Comments

Question 14:
Should the sheriff principal be able to transfer the case to a different sheriffdom (area) if this is thought appropriate and if it may speed up the holding of the FAI?
Yes ☐ No ☐
Comments

Question 15:
What impact do you think that the proposals to speed up FAIs will have on you, your organisation or community?

Comments

**Fatal Accident Inquiry accommodation**

Question 16:
Do you agree with the proposal that the majority of FAIs should be dealt with in ad hoc locations, but FAIs which relate to deaths in rural or remote areas should still be dealt with in local sheriff courts?
Yes ☐ No ☐
Comments

Question 17:
Do you think that all FAIs in Scotland should be held in three bespoke, dedicated centres?
Question 18:
What impact do you think that the use of FAI centres, or taking FAIs out of sheriff courts, will have on those attending FAIs?

Comments

Sheriffs’ recommendations

Question 19:
Should it be mandatory for all FAI determinations, subject to redaction, to appear on the SCS website and be fully searchable?

Yes ☐  No ☐

Comments

Question 20:
Do you think that sheriffs should instruct the dissemination of their recommendations (if any) to the parties to whom they are addressed and any appropriate regulatory bodies?

Yes ☐  No ☐

Comments

Question 21:
Do you agree that parties to whom sheriffs’ recommendations are addressed should be obliged to respond to the sheriff who presided over the FAI indicating what action had been taken? This would be on the basis that those parties would not be obliged to comply with the sheriff’s recommendations, but if they have not complied they would be obliged to explain why not.

Yes ☐  No ☐

Comments

Question 22:
What impact do you think that the proposals regarding sheriffs’ recommendations will have on you, your organisation or community?

Comments

**Legal aid for bereaved relatives**

**Question 23:**
Do you agree that the existing arrangements for legal aid for bereaved families at FAls should remain?

Yes ☐ No ☐

Comments

**Question 23a:**
If you answered ‘no’ to question 23, in what ways would you change the arrangements for legal aid for bereaved families?

Comments

**Question 24:**
What impact do you think this proposal will have on your, your organisation or community?

Comments

End of Questionnaire
ANNEX C

EQUALITY IMPACT ASSESSMENT

The purpose of carrying out an Equality Impact Assessment is to aid the Scottish Government in discharging its Public Sector Equality Duty under section 149 of the Equality Act 2010. The Scottish Government is required to assess the impact of applying a new or revised policy or practice against the needs in the public sector equality duty - to eliminate unlawful discrimination, to advance equality of opportunity and to foster good relations.

The protected characteristics that must be profiled against the policies are:

- Age
- Sex
- Pregnancy and maternity
- Disability
- Race
- Religion or belief
- Gender Reassignment
- Sexual Orientation

To help inform our Equality Impact Assessment of the policy proposals to reform FAI legislation, it would be helpful if you could answer the following question.

Please tell us about any potential impacts, either positive or negative, you feel any or all of the proposals in this consultation may have on a particular group or groups of people.

Comments

There is a question about the impact of each proposal at the end of every chapter in the consultation paper (and section on the above questionnaire). Responses to these questions will also inform our EQIA.