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Dear Christine,

I wish to thank you and other members of the Justice Committee for your consideration of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill and for the contributions made by Committee members to the Stage 1 Debate.

It became apparent during the debate from some Members' contributions that there are matters where greater clarity would be welcome about the system of death investigation in Scotland, fatal accident inquiries (FAIs) generally and about the provisions of the Bill. I would like to address these in advance of Stage 2.

Annex A attached to this letter, which has been copied to the Scottish Parliament Information Centre, addresses the key points. Annex B contains details of what may be involved in a death investigation. I hope you and the Committee members will find this helpful for your consideration of the Bill at Stage 2.

My officials will also share the notes on the purpose and effect of Scottish Government amendments with the Justice Committee, which will aid your consideration of the policy and details of the proposed amendments.

I look forward to working with you on the progression of the Bill.



PAUL WHEELHOUSE

Death Investigations and the FAI system

- The Crown Office and Procurator Fiscal Service (COPFS) independently investigates approximately 5,500 deaths each year, about half of the number reported to COPFS.
- Procurators fiscal have a common law duty to investigate all sudden, suspicious, accidental and unexplained deaths to establish the circumstances and cause of death.
- These investigations are not carried out under FAI legislation – they are a common law duty.
- Of the 5,500 death investigations each year, only 50-60 result in an FAI.
- Where no FAI has been held, this does not mean that there has not been an independent investigation of a sudden, suspicious or unexplained death by COPFS or indeed by another investigative agency such as the Health and Safety Executive or the Mental Welfare Commission for Scotland (MWCS).
- The investigation to prepare for an FAI is carried out under FAI legislation, either when the death falls within a mandatory category (in legal custody or as a result of an accident in the course of employment or occupation) or when the Lord Advocate decides that a discretionary FAI should be held in the public interest.

Fatal accident inquiries should hold people to account?

- FAIs are not meant to hold people to account, as the media occasionally mistakenly suggest. The Bill will ensure that FAIs remain inquisitorial fact-finding hearings and the aim is for these to be inquisitorial, not adversarial.
- To be precise, FAIs are inquisitorial judicial inquiries held in the public interest to establish the circumstances of sudden, suspicious or unexplained death or deaths which have caused serious public concern.
- The sheriff will consider what steps (if any) might be taken to prevent other deaths in similar circumstances.
- FAIs are held in the public interest and not principally for the family to get answers or closure.
- FAIs do not apportion blame or guilt in the civil or criminal sense. That is for civil or criminal proceedings. Criticism may sometimes be inferred from a finding or recommendation therefore a sheriff's determination is inadmissible in civil and criminal legal proceedings. In order to further protect the inquisitorial principle, responses to sheriffs' recommendations will similarly be inadmissible.

Public interest

There were calls during the debate for public interest to be defined and concerns that it is too narrow and does not take families into account.

- COPFS, under the direction of the Lord Advocate, will, independently of the Scottish Government, determine public interest based on the circumstances of individual cases.
- The Solicitor Advocate confirmed that COPFS consider the family interest to be part of the public interest, however occasionally the two may differ and the public interest would be the determining factor.

Adversarial FAIs

- An aim of the Government's Bill is to make FAIs less adversarial as they should be an inquisitorial fact-finding process.
- It is acknowledged that some FAIs become adversarial, due to the differing interests of some of the participants, however that should not mean that we should not attempt to make them less adversarial.
- The Bill and FAI Rules made under the Bill will make provisions to ensure that FAIs are approached as an inquisitorial process.

Mental health deaths

Section 37 of the Mental Health (Scotland) Act 2015 imposes a duty on the Government to undertake a review, within three years, of the arrangements for investigating the death of a patient who was detained in hospital by virtue of the Mental Health (Scotland) Act 2003 Act, or the Criminal Procedure (Scotland) Act 1995; or who was admitted voluntarily to hospital for the purpose receiving treatment for a mental.

It would clearly be premature and inappropriate to legislate on mandatory FAIs for detained mental health patients when a review of the arrangements for the investigation of deaths of such patients has been required by statute and is in immediate prospect.

- Neither the MWCS nor the Royal College of Psychiatrists want mandatory FAIs for patients who are subject to compulsory mental health detention orders and have commented that deaths of this category of patient give rise to no more concern than deaths of other mental health patients.
- The MWCS has powers to conduct investigations where it considers that a person with mental disorder may have been subject to ill-treatment, neglect, or deficiency in care or treatment. It is notified of all deaths by suicide of detained patients.

Mandatory inquiries into deaths of children in care or looked after children

The Scottish Government has set up a Child Death Review Working Group to explore the current practice of reviewing child deaths in Scotland which has reported to Scottish Government and is awaiting Ministerial approval. It would not be appropriate to make any changes to the system in relation to child deaths before the outcome of this Review.

- The Centre for Excellence for Looked After Children in Scotland do not favour mandatory FAIs because it said there was no certainty it would lead to improvements in services for looked after children and those leaving care
- Glasgow City Council during evidence said that “the current measures are sufficient and it supports the Government’s provision that a mandatory FAI is not needed in every case”.
- The Bill provides for mandatory inquiries into deaths of children in secure accommodation – FAIs can be held in other circumstances if it considered to be in the public interest by the Lord Advocate.
- A mandatory FAI may cause the bereaved family unnecessary further distress.
- The Government already provides for deaths of Looked After Children through the reporting requirements of the Looked After Children (Scotland) Regulations 2009, (which require local authorities to notify the Scottish Ministers and the Care Inspectorate of a death within 1 working day).
- Deaths of children in residential establishments are investigated and reviewed by the Care Inspectorate and half are as a result of health issues. It is difficult to see how the public interest would be served by having a FAI for every such case.
- The Care Inspectorate identifies any lessons to be learned and makes recommendations for review of legislation, policy or guidance – COPFS liaise with and refer to Care Inspectorate reports to inform its decisions on whether to hold an FAI

Sheriffs’ recommendations

The former Lord President, Lord Gill, the Solicitor General, the Health and Safety Executive and the Faculty of Advocates are among those who did not favour making sheriffs’ recommendations legally binding.

The Justice Committee:

- welcomed the proposal in the Bill to require sheriffs’ determinations to be published and to require parties involved in the inquiry to which a recommendation is addressed to respond to the recommendations;
- considered that the proposals struck the correct balance between improving compliance with the recommendations;
- noted the view of witnesses that there could be difficulties in placing a duty on a particular body to monitor the implementation of sheriffs’ recommendations and considered the proposals in the Bill to be sufficient.

The Government will support an amendment at Stage 2 requiring SCTS to report on responses to sheriffs’ recommendations in order that, over time, trends may be identified and rates of response recorded.

COPFS’ Family Liaison Charter

The draft charter was issued to the Justice Committee by COPFS as part of its consultation over the summer. The charter is being updated following this consultation and COPFS will publish the consultation responses in due course.

- The charter will set out the different stages of the death investigation process in Scotland and confirm what information will be provided to the bereaved family and when.
- Under its terms, the bereaved family will be informed of the progress of any criminal proceedings and the likelihood of an FAI being held.

During the Debate Patricia Ferguson MSP said *“the problem is often the time that Crown Counsel takes to make the decision, not the time that is taken to communicate the decision once it is made... there should be no situations in the future in which people are left for four or five years without even knowing whether an FAI will take place”*.

In cases which require further investigation COPFS have made a commitment in the charter to:

- contacting the bereaved family no later than 12 weeks after the date the death was reported to inform the family of progress with the death investigation.
- A personal meeting will be offered which will take place within 14 days unless the family declines the offer.
- Thereafter COPFS will contact the family every six weeks to advise of the progress of the investigation.
- At any stage where there is a significant development, COPFS will contact the family immediately, unless this would be likely to prejudice any potential prosecution.
- When a report is to be submitted to Crown Counsel for a decision on whether or not there should be a discretionary FAI the family's views will be taken into account in reaching a decision.
- The family will be informed of the decision within 14 days.
- If the decision is not to hold an FAI, the family will be offered a meeting within 14 days to explain the reasons for the decision. The reasons will be confirmed in writing unless the family have indicated they do not wish to be provided with these.
- If the family are unhappy with the decision, they may ask for the decision to be reviewed.
- At the conclusion of any FAI, COPFS will offer to meet the family to explain the outcome and any issues arising.

The Scottish Government has welcomed Patricia Ferguson's suggestion that the charter have statutory status and will support an amendment providing for that.

Delays

COPFS recently published a bulletin which states that *“the Solicitor General recognised concerns that have been raised over the length of time that it takes to conclude investigations and inquiries in order to reach a point where a decision can be taken on whether or not to hold an FAI, indeed she shared those concerns.”* – a reference to the evidence given by the Solicitor General to the Justice Committee.

Statistics in the bulletin indicate that the time taken to commence an FAI from the date of death has decreased when considering cases where the death occurred after April 2012 when the Scottish Fatalities Investigation Unit (SFIU) within COPFS was established.

- For these cases the average time between the date of death and the start of the FAI is 518 days, which is less than a year and a half.
- Previously the average time taken to hold the FAI from date of death was 808 days.

Providing written reasons for not holding an FAI

COPFS recognises that the key principle must be that where families want detailed reasons why no FAI is to be held then they will get them. COPFS are committed to this principle, but are aware that not all families want detailed reasons to be provided and even within families, different family members may wish to be communicated with in different ways and may require a different level of detail. Therefore a blanket approach is not desirable.

- In practice, in cases reported to Crown Counsel for a decision to be made on whether to hold a FAI, views will always have been sought on whether the family wish a FAI and whether they wish to be provided with written reasons.
- **COPFS will provide written reasons where the family have indicated they wish them.** This will be done sensitively and in accordance with the expressed wishes of the family on what level and type of communication they want without the need for a separate bespoke request being made.
- This seems the more appropriate approach than making the provision of written reasons automatic in every case.
- The commitment to provide written reasons in accordance with the family's wishes will be underpinned within the COPFS Family Liaison Charter.

Deaths abroad

The provision in the Bill to allow discretionary FAIs into deaths of Scots abroad is to implement a recommendation by Lord Cullen.

- Such FAIs will only be held when the death has not been adequately investigated by the foreign authorities and where there is a real prospect that the circumstances of the death would be sufficiently established in an inquiry.
- COPFS will not have powers to require the production of evidence and will rely on the co-operation of the foreign authorities.
- The Bill will not address the apparent issues that Scots families have when a relative dies abroad, such as lack of communication with UK and foreign authorities and 'red tape' – such issues cannot be addressed by COPFS.
- The Scottish Government has been engaging with Deaths Abroad You are Not Alone (DAYNA), in order to improve the process for bereaved families.
- The Scottish Government agreed it would facilitate discussions with organisations who are involved when a Scottish domiciled person dies overseas and their body is to be repatriated to Scotland. The aim is for relevant organisations to agree protocols in order that a collaborative service to families can be provided.

FAIs for deaths of service personnel in Scotland

The Scottish Government has sought and received the in principle agreement of the UK Government to provide for mandatory FAIs into the deaths of service personnel on active service in Scotland.

- This will be achieved by an Order under section 104 of the Scotland Act 1998 due to the Defence reservation. Therefore this provision will not be taken forward in the Bill itself but, rather, via section 104 procedures.

- The provision for deaths of service personnel in Scotland will not affect the employment status of service personnel – this remains covered by the Defence reservation.

FAIs for deaths of service personnel abroad

The Bill provides for FAIs into deaths of service personnel abroad, but this is not a new provision.

- The Coroners and Justice Act 2009 contained arrangements for such FAIs and it amended the existing Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976.
- The Bill simply re-enacts this provision.

Further proceedings

- The provision in the Bill to enable further proceedings is to implement a recommendation by Lord Cullen.
- This power is to be used by the Lord Advocate to instigate further proceedings when new evidence comes to light in relation to the circumstances of a death which might mean that a finding or recommendation from a previous FAI would be materially different.
- This provision is not for families who are dissatisfied with the handling or outcome of the original FAI – the appropriate remedy would be judicial review were there any legal flaw in decision making.

Lord Cullen recommendations which are not being taken forward in the Bill

The only recommendations not included in the Bill or Rules are the following:

Early FAIs when mandatory

Lord Cullen recommended that the fiscal should apply for an early inquiry when a mandatory case and keep all parties informed of investigation

- In its Stage 1 Report, the Committee was not convinced that this was necessary due to the Solicitor General's commitment to produce a charter outlining what families can expect from COPFS in terms of the timings of investigations and decision-making.

Deaths of persons subject to compulsory detention by a public authority

Lord Cullen recommended that such deaths should be the subject of a mandatory FAI

- Such deaths are already the subject of investigation by the procurator fiscal and the Lord Advocate has discretionary power to hold an FAI into such deaths when it is considered to be in the public interest
- The then Lord President, Lord Gill, agreed that the current discretionary power is sufficient:

“I think that we are in danger of imposing unnecessary rigidity on the system. The system by which the Crown makes investigations and forms judgments is, I think, the best model”.

- As the Solicitor General told the Committee, the possibility of a discretionary FAI is the “final safeguard” in terms of ECHR compliance under the Scottish system.

Legal aid

Lord Cullen recommended that 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.

- While it is important that relatives should be able to participate appropriately in FAIs, this does not require automatic legal representation in every case.
- In the current financial climate, it has been necessary to better control legal aid expenditure, although anyone who is eligible for legal aid will be granted it.
- Ministers are determined to provide a legal aid system which maintains access to justice as far as possible.
- All civil legal aid applications need to meet the statutory tests of probable cause and reasonableness.
- 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.

Information on recommendations and response from bodies, including an annual report

Lord Cullen recommended that the Scottish Government should publish such information on its website and report to Parliament on an annual basis. Lord Cullen made this recommendation before the Scottish Courts and Tribunals Service (SCTS) was made independent to and separate from the Scottish Government.

- the Scottish Government will support an amendment requiring an annual report on responses to sheriffs’ recommendations to be published with a focus on reporting cases where responses were not received.
- By providing for recommendations and responses to be published on the SCTS website, this recommendation has effectively been implemented.

Law Society briefing

The Law Society proposed a statutory right to request an FAI if the family is dissatisfied with the decision not to hold an FAI. I would want to highlight that:

- The Lord Advocate’s decision to hold an FAI is made in the public interest. It would be inappropriate to give a statutory right to families to request an FAI since there may be no public interest in doing so;
- The motive of legal representatives requesting an FAI on behalf of families may stem from a desire to find grounds for civil proceedings;
- If the family does not agree with a decision then that can be challenged by judicial review if there is any legal flaw in decision making;
- COPFS already involve the family in the decision to hold an FAI, however this must be weighed up against the public interest;
- Although the Law Society envisaged only a few additional hearings per year, such a request could become a matter of course by families or their legal representation; and

- This proposal undermines the role of the procurator fiscal as the independent investigator of deaths and the principle that the Lord Advocate, as the head of deaths investigations in Scotland decides in the public interest whether there is to be an FAI.

The briefing also raised the lack of change to legal aid provision and providing a sanction for not complying with either a sheriff's recommendation or a duty to respond to a recommendation. These matters are dealt with above.

Death investigations

The procurator fiscal's investigation at common law or under FAI legislation will involve, some, if not all, of the following, depending upon the circumstances of the death:

- ingathering of evidence, which includes witness statements submitted by the police and other reporting agencies, and those dictated by medical personnel, etc;
- the need to consider whether criminal proceedings are appropriate;
- receipt and consideration of reports from external agencies. For example: Police Scotland Collision Investigation Reports in road traffic fatalities (normally received no earlier than 8 weeks after the death); Air Accident Investigation Branch (AAIB) (normally received no earlier than 1 year after death); Health and Safety Executive reports; Health board internal reviews; Local authority Social Work Significant Case Reviews;
- instruction of independent expert opinion to consider particular aspects of the circumstances of the death or the care and treatment provided to a deceased;
- precognition of witnesses;
- sharing of information with nearest relatives following significant developments, as appropriate;
- sharing of information as appropriate with external agencies (who may subsequently become interested parties) for example a Health Board, whose care or conduct has been the subject of scrutiny by an expert;
- further supplementary expert reports, following sharing of information with external agencies and nearest relatives; and
- Reports to Crown Counsel via the Scottish Fatalities Investigation Unit (SFIU), which may initiate further investigations prior to a decision being made in respect of whether a discretionary FAI should be held. SFIU National or Crown Counsel's instruction will always be communicated back to the procurator fiscal via SFIU National.