

# Crime and Justice: Civil Justice

## Consultation on Proposals to Reform Fatal Accident Inquiries Legislation

### Analysis of Consultation Responses

# **CONSULTATION ON PROPOSALS TO REFORM FATAL ACCIDENT INQUIRIES LEGISLATION**

## **ANALYSIS OF CONSULTATION RESPONSES**

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Scottish Government Social Research  
2014

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## **EXECUTIVE SUMMARY**

### **Background**

1. The Scottish Government's consultation on amending the legislation that governs Fatal Accident Inquiries (FAIs) will inform subsequent legislation which will largely implement the recommendations made by 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 Legislation (subsequently referred to as Lord Cullen's Review).
2. An FAI is an examination of the circumstances of a death to determine the time, place and cause of death. They are fact-finding inquiries held in the public interest and 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.
3. The Scottish Government agrees with the majority of the 36 recommendations made in Lord Cullen's Review, and some have already been implemented by the Crown Office and Procurator Fiscal Service (COPFS). Many of the further recommendations would require primary legislation and the consultation focused on these issues. The areas covered are:
  - Mandatory categories of FAIs;
  - Deaths abroad;
  - Delays;
  - Fatal Accident Inquiry accommodation;
  - Sheriffs' recommendations; and
  - Legal aid for bereaved relatives.
4. Fifty seven analysable responses were received, 49 from groups and 8 from individuals. The group responses included 4 insurance industry bodies or firms, 14 legal bodies or firms, 7 local authorities, 15 public bodies and 9 representative groups. Individual respondents included members of the legal profession, including current and former members of the judiciary, other interested members of the public, and an MSP.
5. Along with a brief overview of the issues raised, this summary gives the overall balance of opinion on each of the questions which invited a 'Yes or No' response. Given that not all respondents answered all questions, the number of respondents varies question by question.

### **Mandatory categories of FAIs**

6. The consultation paper gave an overview of the current legislation, setting out that an FAI is mandatory for deaths as a result of an accident in the course of employment or in legal custody, including prison.

7. The Government intends to maintain the provision for mandatory FAIs into deaths that appear to have resulted from an accident occurring whilst working, with the majority of respondents (29 out of 36), agreeing that the current mandatory provision for work-related deaths is sufficient. Issues raised included that holding additional FAIs would have public resource implications and could actually exacerbate the delays which other proposals are seeking to address. Some respondents questioned whether expanding the circumstances which would trigger a mandatory FAI would be in the public interest and, in particular, questioned whether any benefits would result. There were specific concerns about whether it would in any case be realistic to hold some of these FAIs, particularly given that some cases could refer to events of many years ago.
8. Those who did not agree that the current provisions are sufficient questioned the 'no public interest' argument and pointed to occasions, such as deaths from industrial disease and in the event of any work-related fatal road traffic accident, when they believed FAIs should be held.
9. A substantial majority agreed that a death which occurs when a person has been arrested or detained by police (31 out of 33 respondents), or the death of a child whilst in 'secure care' (29 out of 33 respondents), should be subject to a mandatory FAI. In both cases many noted that a transparent process was important to foster and maintain trust in state institutions. The small number of respondents disagreeing tended to suggest that an element of discretion and flexibility should be retained.
10. As the consultation paper explains, the Scottish Government does not agree with the requirement for a mandatory FAI if the death of a child occurs whilst they are resident at other residential child care (such as private boarding schools or residential special schools). Compared with many of the proposals in the consultation, respondents were divided on this issue, although a clear majority (21 out of 32 respondents), did support the Government's position. Those who agreed sometimes suggested the existing arrangements are sufficient or pointed out that many of the deaths of children in residential establishments are the consequence of life-limiting conditions. Those who disagreed, and therefore considered that the requirement for mandatory FAIs should cover other forms of residential accommodation, frequently made the straightforward point that all child deaths in residential care should be investigated through an FAI.
11. Lord Cullen 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. Although the Government accepted the principle of an independent investigation, it considers that there should continue to be some discretion to determine whether an FAI is appropriate in particular cases. The consultation paper identified two possible future options: 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, such as the Mental Welfare Commission, combined with the continuation of the Lord Advocate's duty to investigate the death and a discretionary power to initiate an FAI. Respondent opinion was divided, albeit with a clear preference for the first option: 20 out of 28 respondents supported

the first option; and 13 out of 30 respondents supported the second option, which was opposed by a clear majority.

12. Those who expressed a preference for an investigation by the procurator fiscal sometimes simply noted that the current arrangements appear to work satisfactorily and hence should not undergo significant change. Others thought that an element of discretion as to the type and level of investigation should be retained. Some concerns were raised, however, including that holding an FAI for all of those who died while subject to detention would be disproportionate, could be distressing for families and would risk diverting attention from other deaths which may be more appropriate for investigation.
13. The positive case put forward in support of a case review investigation by a public authority such as the Mental Welfare Commission included that it would appear to offer greater transparency. It was also suggested that an 'expert authority' such as the Mental Welfare Commission could provide a higher level of scrutiny and, by extension, ensure that all areas where practice could be improved are identified. However, there were concerns that this option would not command a sufficient level of respect and the powers available would be less than those available to the Lord Advocate in an FAI.
14. In terms of the impact the mandatory categories proposals could have on themselves as individuals, their organisation or their community, a number of respondents were of the view that the proposals would have minimal or no impact on themselves or the area in which they worked. Some respondents pointed to the resource implications of any possible changes. Others commented on the possible impact of the proposals on bereaved families.

### **Deaths abroad**

15. Under current legislation, there is no provision for holding an FAI into the death of a person domiciled in Scotland who dies abroad, even if the body is repatriated to Scotland. The Scottish Government proposes that there should be power to hold an FAI into the death of a person domiciled in Scotland who dies or is killed abroad but that this should be at the discretion of the Lord Advocate and should only apply where the body has been repatriated to Scotland. The very clear majority (31 out of 32 respondents), agreed with the Government's proposal, with some noting that any powers are not likely to be used extensively and only on the basis of public interest considerations.
16. The consultation paper set out three possible criteria to be considered in deciding whether to hold an FAI. These were: 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. The majority agreed with all three of the criteria suggested, although a small number did not agree with the second criterion. The principle issue raised was how an assessment could be made as to whether a satisfactory investigation had been carried out.

17. In terms of the impact the deaths abroad proposals could have on themselves as individuals, their organisation or their community, a number of respondents were of the view that the proposals would have minimal or no impact on themselves or the area in which they worked. The most frequently raised issues were the practical and resource implications of introducing these proposals, with some suggesting these could be significant. Others identified positive impacts that the proposals could have, including that they could provide an opportunity to offer support and bring solace to bereaved families at an extraordinarily difficult time.

## **Delays**

18. The consultation paper notes that there has been some criticism in recent years in relation to what are seen as unacceptable delays in holding FAIs, with the main concern being about the time between a death and the resulting FAI taking place. Lord Cullen did not recommend time limits for FAIs and a large majority of (37 out of 45 respondents), agreed with his position, albeit that some also noted their concern about unacceptable delays and the distress these may cause.
19. Reasons given for not supporting mandatory timescales included that an FAI is not usually heard before any potential criminal trial is concluded, that many of the public bodies involved are beyond the control of the Lord Advocate, and that imposing unrealistic timescales on COPFS could undermine the quality of their investigations. Concerns were also raised that imposing time limits could simply result in FAIs being opened on a mandatory date, but then adjourned. Many of those who did not support mandatory timescales still offered suggestions for improving the current approach. Suggestions often focused on the need for transparency and clarity and included, for example, that in non-complex cases, it would be realistic to set a notional timescale for opening an FAI and that the Scottish Government should issue guidance to help prevent undue delay.
20. Those who thought that mandatory timescales should be introduced raised similar issues, although sometimes drew different conclusions about the best way forward. It was noted, for example, that there are many other areas of the law in which time limits already exist and that while time limits may be arbitrary they could also bring focus.
21. An area in which change is proposed is in relation to preliminary hearings, with the intention being that these should become standard practice unless the sheriff dispenses with one if, for example, the outcome of the FAI is likely to be purely formal. All of the 44 respondents who answered this question agreed that preliminary hearings should be held to help speed up the process of FAIs. Many respondents noted that preliminary hearings are already used in a number of other types of proceedings or pointed to the apparently successful use of preliminary hearings for FAIs in Edinburgh and Glasgow Sheriff Courts. Potential benefits of holding preliminary hearings identified by respondents included that administrative and practical matters could be dealt with early on, allowing subsequent efforts to focus on the most important issues.
22. Other options for speeding up FAIs covered in the proposals were: pre-hearing meetings of experts; hearing some business in sheriffs' chambers; the

submission of evidence in advance; and transferring cases to a different sheriffdom. The significant majority of respondents agreed that having pre-hearing meetings of experts would help speed up FAIs (35 out of 37 respondents), that the submission of statements to the sheriff in advance should be permitted (32 out of 40 respondents), and that the sheriff principal should be able to transfer a case to a different sheriffdom if this was thought appropriate and might speed up the holding of the FAI (42 out of 44 respondents). However, relative to many other questions, views on whether hearing some business in sheriffs' chambers would help speed up FAIs were mixed, with 23 out of 37 respondents in agreement and some others seeking more information before feeling able to offer their support.

23. Further comments made often simply gave support for any measures that would help improve the speed and efficiency of FAIs, often suggesting that the proposals appeared to offer common sense solutions. The importance of ensuring that the needs of bereaved families are considered, including by keeping them informed of the progress of an FAI, was also stressed. A number of respondents noted that the impact on families and witnesses of transferring an FAI to a different sheriffdom would need to be given careful consideration. Other notes of caution included that care would need to be taken to ensure that the benefits derived from any of these measures justified the use of resources involved. The specific concern raised by those who opposed the use of sheriffs' chambers was that the openness and transparency of the process could be compromised.
24. In terms of the impact the proposals could have, respondents most frequently pointed to a quicker outcome being of benefit to all involved but especially to bereaved families at what will be a very stressful and distressing time. The other frequently identified positive impact was ensuring that any lessons are learned as soon as possible, thus reducing the likelihood of similar incidents occurring and, most critically, avoiding unnecessary deaths in the future.

### **Fatal Accident Inquiry accommodation**

25. The consultation sought views on the use of ad hoc accommodation for FAIs, along with the possibility that all FAIs in Scotland might be held in dedicated centres. The majority of respondents agreed that FAIs should be dealt with in ad hoc locations (28 out of 39 respondents), and disagreed with the establishment of three bespoke, dedicated centres (29 out of 40 respondents). However, a small minority of respondents took the alternative view (11 out of 40), agreeing with the establishment of the three bespoke centres rather than the use of ad hoc locations.
26. Many of those who agreed with using ad hoc locations pointed to the need to make best use of the range of accommodation available, particularly if delays in holding FAIs can be reduced as a result. It was also suggested that taking an FAI out of the court setting could help avoid the Inquiry becoming adversarial in nature.

27. The principal objections to creating bespoke FAI centres were in relation to the impact on those attending the FAI, and bereaved families in particular. Those raising this concern often pointed to the inconvenience and possible costs incurred, as well as the possibility that people may feel more comfortable in familiar locations which are close to their support networks. There were also concerns that transfers could lead to some dilution of the principle that justice should be local or that there could be a loss of local knowledge from any of the parties involved, including the sheriff. Other respondents questioned whether establishing such centres was necessary (given the option to use ad hoc locations and the number of FAIs held), or whether the costs could be justified, particularly at a time when public sector budgets are under pressure.
28. However, others disagreed and suggested there could be organisational advantages to being able to concentrate FAI business. The potential to concentrate expertise, including through the opportunity for dedicated specialist sheriffs to conduct FAIs, was also raised.
29. In terms of the impact the proposals could have, some respondents noted that the impact on bereaved family members and witnesses will depend on how far they may have to travel to attend an FAI. A number also went on to suggest that any negative impacts (such as needing to pay travel or accommodation costs), must be mitigated.

### **Sheriffs' recommendations**

30. The consultation included a proposal for all FAI determinations, subject to redaction, to appear on the Scottish Court Service website and be fully searchable. All but one of the 43 respondents who answered this question agreed with this proposal. In their further comments many suggested the proposed approach was common sense, would help improve transparency, would promote learning and is already common practice in any case.
31. A very large majority (41 out of 44 respondents), also thought that sheriffs should instruct the dissemination of their recommendations (if any) to the parties to whom they are addressed and any appropriate regulatory bodies. This was seen as consistent with an open and transparent approach, with the potential to learn lessons being maximised. However, it was also suggested that the majority of sheriffs do not support this approach and that ensuring a copy of the sheriff's determination is sent to the correct professional body is not a matter for legislation.
32. The third proposal relating to sheriffs' recommendations sets out 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. A clear majority of respondents (29 out of 44), agreed with the proposal.

33. Some suggested the proposed approach would help support an open and transparent process and would also introduce an element of public accountability. Others noted that there may be reasons why the sheriff's recommendations do not need to be acted upon or are not realistic or practical, but that there should be a public record to allow for an element of 'follow-up' and, in particular, to allow interested parties to find out why recommendations have not been acted on.
34. However, others took a different view and suggested that once the FAI has been completed the role of the sheriff should also conclude and it would not be appropriate for any response to or reporting on recommendations to be directed to the sheriff. From the practical perspective some commented that, even if it were appropriate, the resources are simply not available to allow sheriffs to undertake this role and that, in line with Lord Cullen's recommendations, responsibility should fall to the Scottish Government. Sheriffs would not have any role in monitoring or assessing compliance with their recommendations once their determination is issued.
35. Finally, some respondents expressed their disappointment that the Scottish Government was not taking a 'stronger' position on enforcement of recommendations.
36. In terms of the impact the proposals could have, a number of respondents were of the view that the proposals would have minimal or no impact on themselves or the area in which they worked. Where possible impact was identified, respondents generally pointed to serving the public interest by helping prevent repeated accidents and future deaths and that bereaved relatives may find some comfort if lessons are learned from the death of their loved one.

### **Legal aid for bereaved relatives**

37. The Scottish Government proposes that the current legal aid arrangements for bereaved relatives would continue to apply. The majority of respondents agreed with this proposal (23 out of 36), although a significant minority did not. A number of respondents made a broad statement of support for the continued provision of legal aid to bereaved families where appropriate, and that it is important to ensure access to judicial proceedings for those who have a legitimate need to be represented but also that it is important to remain focused on FAIs being fact-finding rather than fault-finding exercises.
38. On the assessment of reasonableness, some agreed with Lord Cullen's recommendation that there is or may be a case for different or less stringent rules being applied and/or for legal aid limits being increased. However, others disagreed and thought the current 'reasonable test' remains appropriate.

## **Table of Contents**

### EXECUTIVE SUMMARY

1	INTRODUCTION	1
2	MANDATORY CATEGORIES OF FAIS	5
3	DEATHS ABROAD	18
4	DELAYS	22
5	FATAL ACCIDENT INQUIRY ACCOMMODATION	37
6	SHERIFFS' RECOMMENDATIONS	42
7	LEGAL AID FOR BEREAVED RELATIVES	49
	ANNEX: GROUP RESPONDENTS	52

## **1 INTRODUCTION**

- 1.1 This report presents an analysis of the views contained in responses to the Scottish Government's consultation on proposals to amend the legislation that governs Fatal Accident Inquiries (FAIs). The proposals would largely implement the recommendations made by 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 Legislation (subsequently referred to as Lord Cullen's Review).

### **Background to the consultation**

- 1.2 As the consultation paper notes, 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.
- 1.3 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.
- 1.4 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.
- 1.5 There are only around 50-70 FAIs per year, 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.

### **Focus of the consultation**

- 1.6 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 21<sup>st</sup> century. The Scottish Government agrees with the majority of the 36 recommendations made<sup>1</sup>, and some of those designed to address delays in holding FAIs have

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<sup>1</sup> The reasons why the Government has decided not to take forward some recommendations are set out in Chapter 1 of the consultation paper.

already been implemented by the Crown Office and Procurator Fiscal Service (COPFS). Many of the further recommendations that may be taken forward require primary legislation and the consultation focused on these issues. The areas covered are:

- Mandatory categories of FAIs;
- Deaths abroad;
- Delays;
- Fatal Accident Inquiry accommodation;
- Sheriffs' recommendations; and
- Legal aid for bereaved relatives.

### **Overview of responses**

- 1.7 The consultation ran from the 1<sup>st</sup> July to the 9<sup>th</sup> September 2014, with a total of 58 consultation responses received. One response contained limited information, leaving 57 responses to be taken forward for analysis within this report.
- 1.8 A profile of respondents by type is set out in Table 1 below.

<b>Table 1: Responses Received by Type of Respondent</b>	
<b>Respondent Type</b>	<b>Number</b>
Insurance industry bodies or firms	4
Legal bodies or firms	14
Local authorities	7
Public bodies	15
Representative groups	9
Total Organisations	(49)
Individuals	8
<b>TOTAL</b>	<b>57</b>

- 1.9 Points to note about the respondent groups are:
- The insurance industry bodies or firms group is made up of three insurance companies and the Forum of Scottish Claims Managers.
  - Five legal practices made a submission. The other respondents in the legal bodies or firms group are: the Association of Personal Injury Lawyers; the Faculty of Advocates; the Forum of Insurance Lawyers (Scotland); the Law Society of Scotland; the Scottish Civil Justice Council; the Scottish Legal Action Group; the Sheriffs' Association, the Sheriffs Principal; and the Society of Solicitor Advocates.

- Of the 15 public body respondents, 4 are part of the justice system (the Police Investigations and Review Commissioner, the Scottish Prison Service, the Scottish Court Service and the Scottish Legal Aid Board), 5 have a health focus (Glasgow City Community Health Partnership, the Mental Welfare Commission for Scotland, NHS Grampian, NHS National Services Scotland, and the Scottish Ambulance Service) and 2 have an equalities and human rights focus (the Equality and Human Rights Commission (EHRC) and the Scottish Human Rights Commission (SHRC)). The remaining public body respondents are the Care Inspectorate, the Health and Safety Executive (HSE), Network Rail Infrastructure Limited and the Scottish Public Service Ombudsman (SPSO).
- Of the 9 representative groups, 3 are trades union or trades union co-ordinating bodies (the National Union of Rail, Maritime and Transport Workers (RMT), the Scottish Trades Union Congress (STUC) and Unite), one is a professional body (Royal College of Psychiatrists in Scotland), and 5 are advice or advocacy groups (Action against Medical Accidents, Death Abroad -You're Not Alone (DAYNA), the Medical and Dental Defence Union of Scotland (MDDUS), Scotland's Campaign against Irresponsible Drivers (SCID) and Victim Support Scotland).
- Individual respondents include members of the legal profession, including a current and a former member of the Scottish judiciary (Lord Cullen), other interested members of the public, and an MSP.

1.10 A list of the organisations that submitted a response to the consultation is included as an annex to this report.

### **Structure of the report**

- 1.11 The remainder of this report presents a question by question analysis of responses given at each of the questions set out in the consultation document. Again mirroring the consultation document, the analysis is represented in six sections.
- 1.12 Each section of the report begins with a summary of the information provided on the relevant issues within the consultation paper. Given the complexity of some of the issues being considered, readers may find it useful to refer to the original consultation paper for further detail. The paper remains available on the Scottish Government's website<sup>2</sup>.
- 1.13 The results of the 'Yes/No' questions are presented in tabular form. Please note that a small number of respondents did not make their submission on the consultation questionnaire, but submitted their comments in another format. When these responses contained clear answers to one or more of the 'Yes/No' questions these have been recorded. The remaining content was analysed under the most directly relevant consultation question.

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<sup>2</sup> Available at: <http://www.scotland.gov.uk/Publications/2014/07/6772>

- 1.14 The focus of the analysis presented here is very much on the issues covered in the Scottish Government's consultation paper. Some respondents raised a range of other issues connected with FAIs and all of these submissions have been reviewed by the relevant policy team within the Scottish Government. This also applies to comments made within responses which are not to be published at the respondent's request.

## 2 MANDATORY CATEGORIES OF FAIS

- 2.1 The consultation paper gave an overview of the current legislation, setting out that an FAI is mandatory for deaths as a result of an accident in the course of employment or in legal custody, including prison.

### Work-related deaths

- 2.2 The consultation paper noted the Government's intention of maintaining the provision for mandatory FAIs into deaths that appear to have resulted from an accident occurring whilst working.
- 2.3 In a consultation paper on her proposed Inquiries into Deaths (Scotland) Bill, Patricia Ferguson MSP proposed that there should be no distinction between deaths as a result of accidents in the course of employment and what she termed "other workplace incidents which lead to the death of a worker". This proposal would appear likely to bring industrial diseases and other employment issues (such as exposure to chemicals), within the scope of the FAI legislation.

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

- 2.4 The majority of the respondents who answered this question agreed that the current mandatory provision for work-related deaths is sufficient. Responses by respondent type are set out in Table 2 below.

**Table 2: Question 1 - Response by Respondent Type**

Respondent Type	Yes	No	Not Answered No View	Total
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	8	2	4	14
Local authorities	6	-	1	7
Public bodies	8	1	6	15
Representative groups	1	2	6	9
<b>Total Organisations</b>	<b>(27)</b>	<b>(5)</b>	<b>(17)</b>	<b>(49)</b>
Individuals	2	2	4	8
<b>TOTAL</b>	<b>29</b>	<b>7</b>	<b>21</b>	<b>57</b>

- 2.5 Thirty one respondents made a further comment at this question, with many of those responses responding to or commenting on the discussion on this issue set out in the consultation paper.
- 2.6 Many respondents agreed with the consultation paper's assertion that requiring an FAI for all work-related death would lead to a greater number of FAIs being held. Some of these respondents went on to note this would lead to greater utilisation of public resources and could actually help exacerbate the very delays that other proposals seek to address. More specifically, some

respondents referred to the possible impact on a range of services and organisations including the Scottish Court Service, COPFS, the Scottish Legal Aid Board and HSE.

- 2.7 Some respondents questioned whether expanding the circumstances which would trigger a mandatory FAI would be in the public interest and, in particular, questioned whether any benefits would result. A small number of respondents suggested that little if anything new would be learnt from conducting FAIs for all work-related deaths and that there would be limited value in holding repeated FAIs covering the same sets of circumstances. An example given was the danger of asbestos exposure and related injuries and it was suggested that these dangers are already well known and extensively documented. However, the Association of Personal Injury Lawyers called for a flexible approach which recognised that it might, for example, be worthwhile holding an FAI where an industrial disease was contracted in more unusual circumstances, for example whilst working in a school or shop.
- 2.8 There were specific concerns about whether it would in any case be realistic to hold some of these FAIs, particularly given that some cases could refer to events of many years ago. Challenges or problems that respondents suggested could arise included:
- It could be difficult to establish which of several employers could be responsible.
  - The employer who caused the harm might no longer exist or there could have been a transfer of ownership.
  - Key witnesses, including former colleagues of the deceased, may not be available to give evidence.
  - The statutory regulations governing the relevant workplace or industry may already have become more stringent.
- 2.9 A possible compromise suggested was a “cut off” period for cases of historical exposure, or a prescribed list of industrial diseases or substance exposures which would mean an FAI was appropriate.
- 2.10 Finally amongst those who thought the current provisions to be sufficient, there were some concerns that the relationship between FAIs and civil and criminal proceedings could become confused. The Forum of Scottish Claims Managers summarised their position as follows:
- “The FAI is not to a vehicle to repeat evidence from a previous criminal trial or a mechanism to forward evidence which would come out as part of a later civil trial.”
- 2.11 Those who did not agree that the current provisions are sufficient also raised a range of issues, with a small number of respondents pointing to occasions when FAIs are not held for work-related deaths but arguably should be. The

two suggested sets of circumstances were for cases of death from industrial disease and in the event of any work-related fatal road traffic accident.

- 2.12 The STUC and Society of Solicitor Advocates commented on death from industrial disease. Both suggested the argument that there is no public interest case needs to be questioned. Whilst recognising that the events giving rise to the death will be long past in many cases, it was also noted that there remain a significant number of cases where the responsible party is still in existence and yet no consideration is given to the possibility of a prosecution in these cases. The STUC also highlighted the possible but currently unknown health risks for workers that could be associated with new technologies, such as fracking, or with existing work environments, such as exposure to biological agents or chemicals.
- 2.13 The other reason put forward in support of conducting FAIs in the event of industrial disease was that part of the role of the procurator fiscal is to see that accurate death statistics are maintained and that the absence of inquiries into cases of death from industrial disease means that national statistics are less accurate than they should be.
- 2.14 SCID called for FAIs to be held in the event of any work-related fatal road traffic accident, and Sheriff Crowe for FAIs into road traffic deaths where no prosecution takes place. SCID also called for FAIs for road deaths resulting from collisions with emergency or commercial vehicles. They noted that accidents could either involve the death of an employee who is driving or an employee who is driving causing the death of another road user. Most crucially, and whether or not there are criminal proceedings, they called for lessons to be learned and measures put in place to prevent similar occurrences in future. Similarly, Sheriff Crowe suggested that holding an FAI could raise public awareness or, in the case of road traffic accidents, could help avoid further accidents occurring in the same location.
- 2.15 Conversely, one respondent referred to the current mandatory provisions giving rise to FAIs that may not be required or bring benefit. The example given was if a police or HSE investigation concludes that the circumstances of the death are clear or that the death can be attributed to natural causes and a criminal prosecution is not proceeded with. A Legal Firm Respondent (Pinsent Masons LLP), questioned whether the Lord Advocate should not be able dispense with a mandatory FAI under such circumstances, not least because nothing is to be gained from it.

### **Extending the mandatory categories**

- 2.16 Questions 2 to 6 of the consultation paper sought views on extending the mandatory categories.
- 2.17 As the paper notes, the Scottish Government agrees with Lord Cullen's recommendation that the mandatory category of deaths of persons in 'lawful custody' should be updated and extended and also 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?**

- 2.18 A substantial majority of the respondents who answered this question agreed that a death which occurs when a person is arrested or detained by police should be subject to a mandatory FAI. Responses by respondent type are set out in Table 3 below.

**Table 3: Question 2 - Response by Respondent Type**

Respondent Type	Yes	No	Not Answered No View	Total
Insurance industry bodies or firms	-	-	4	4
Legal bodies or firms	8	1	5	14
Local authorities	6	-	1	7
Public bodies	9	1	5	15
Representative groups	4	-	5	9
<b>Total Organisations</b>	(27)	(2)	(20)	(49)
Individuals	4	-	4	8
<b>TOTAL</b>	<b>31</b>	<b>2</b>	<b>24</b>	<b>57</b>

- 2.19 Twenty one respondents went on to make an additional comment, with a small number simply stating their support for Lord Cullen’s recommendation and the Scottish Government’s response. Others noted that it was important for mandatory FAIs to be retained in the public interest in order to ensure transparency and to foster and maintain trust in state institutions.
- 2.20 Also commenting on how the system works at present, the Scottish Legal Aid Board pointed out that their existing guidance indicates that it is considered that the reasonableness test for civil legal aid is met where a death arises while an individual is in custody and that, in practical terms they treat "in custody" as covering deaths in prison, police stations or other care institutions. It was also noted that previous FAIs covering these circumstances have highlighted a number of issues which have since been addressed by police.
- 2.21 In terms of the specific changes proposed, both EHCR and Perth and Kinross Council agreed that the definition should be expanded to cover all situations in which the deceased has been arrested or detained by a police officer. Perth and Kinross Council also suggested that the provisions could be extended to cover those who have attended on a Voluntary Declaration of Attendance basis.

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

- 2.22 Question 3 asked if the death of a child whilst in ‘secure care’ should be subject to a mandatory FAI. The consultation paper explains that the route into secure care would be either through conviction of a crime or via a

decision by a children's hearing to put in place a compulsory supervision order with authorisation for secure care. The Scottish Government agrees with Lord Cullen's recommendation that such FAIs should be mandatory.

- 2.23 The majority of respondents who answered Question 3 agreed that the death of a child in 'secure care' should be subject to a mandatory FAI. However, 3 of the 7 Local Authority Respondents disagreed. Responses by respondent type are set out in Table 4 below.

**Table 4: Question 3 - Response by Respondent Type**

<b>Respondent Type</b>	<b>Yes</b>	<b>No</b>	<b>Not Answered No View</b>	<b>Total</b>
Insurance industry bodies or firms	-	-	4	4
Legal bodies or firms	9	-	5	14
Local authorities	4	3	-	7
Public bodies	8	1	6	15
Representative groups	4	-	5	9
<b>Total Organisations</b>	<b>(25)</b>	<b>(4)</b>	<b>(20)</b>	<b>(49)</b>
Individuals	4	-	4	8
<b>TOTAL</b>	<b>29</b>	<b>4</b>	<b>24</b>	<b>57</b>

- 2.24 Only 16 respondents went on to make a further comment, although some others referred back to comments made at Question 2. The latter had tended to focus on transparency and retaining the confidence of the public.
- 2.25 Other points highlighted by those agreeing with the proposal included that a child or young person subject to secure care is deemed to be at very high risk themselves or to pose such a risk to others; secure care needs offer the highest levels of support and supervision, but also needs to be subject to high levels of supervision, including through the court system.
- 2.26 Perth and Kinross Council, whilst supporting the proposal, also suggested that account needs to be taken of the Scottish Government Review and Reporting Arrangements for Deaths of Looked After and Accommodated Children and Young People. They also noted that the Guidance for Child Protection Committees on Conducting Significant Case Reviews (SCRs) is to be reviewed and suggested that it will be critical for all the arrangements to support and complement each other.
- 2.27 As at Question 2, a small number of respondents disagreed with the proposal. The concerns of those disagreeing with the proposal were that the current arrangements are suitable and sufficient and that an element of discretion and flexibility should be retained.
- 2.28 West Lothian Council took a different view and, whilst agreeing that an investigation should be mandatory, questioned whether an FAI was necessarily the appropriate forum. Their concern was that an FAI could be

distressing for the family and relatives of the child or young person, and suggested an alternative approach might be the appointment of a judicial reporting or investigating officer.

- 2.29 Finally, a small number of respondents commented on what is being meant by the term 'secure care', with the Scottish Legal Aid Board suggesting that the necessity for a mandatory FAI in the event of the death of a child resident in care, including private boarding schools, has not been shown. These issues are covered further under Question 4 below.

**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?**

- 2.30 As the consultation paper explains, 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.
- 2.31 The Scottish Government does not agree with the requirement for a mandatory FAI if the death of a child occurs whilst they are resident at one of these other categories of residential childcare and Question 4 asked respondents whether they agreed that FAIs should not be mandatory.
- 2.32 Compared with many of the proposals included within this consultation, respondents were divided on this issue, although a clear majority did support the Government's position. The exception was amongst Individual Respondents and Legal Bodies or Firms Respondents, with the majority of those who responded at this question supporting mandatory FAIs. Responses are set out in Table 5 below.

**Table 5: Question 4 - Response by Respondent Type**

Respondent Type	Yes	No	Not Answered No View	Total
Insurance industry bodies or firms	1	-	3	4
Legal bodies or firms	3	5	6	14
Local authorities	7	-	-	7
Public bodies	8	1	6	15
Representative groups	2	1	6	9
<b>Total Organisations</b>	<b>(21)</b>	<b>(7)</b>	<b>(21)</b>	<b>(49)</b>
Individuals	-	4	4	8
<b>TOTAL</b>	<b>21</b>	<b>11</b>	<b>25</b>	<b>57</b>

- 2.33 Twenty seven respondents made a further comment. Those who agreed that such FAIs should not be mandatory identified a number of reasons why not. These included that the existing arrangements (discretion to hold an FAI, along with the reporting requirements of the Looked After Children (Scotland) Regulations 2009, as amended), are suitable and sufficient. A small number of respondents also suggested that mandatory FAIs would be inappropriate when liberty is not restricted.
- 2.34 Whilst agreeing with the broader proposal, the Mental Welfare Commission cautioned that:
- “...particularly where children have learning disabilities or mental health problems, it is too simplistic to assert that this [an FAI] is unnecessary because they are not detained against their will. The reality for many such children is that they are not in a position to leave of their own volition, and are effectively subject to the control of the state. Particularly in cases of suicide, it is important that there is some independent review...”
- 2.35 However, as at Question 3, Glasgow City Council, along with the Care Inspectorate, pointed out that some of the deaths of a child in residential establishments are the consequence of life-limiting conditions and that there would be no benefit in holding an FAI in every case, not least because of the distress caused. The STUC had concerns that kinship and foster carers would be amongst those who could be subject to this distress and that this could affect their willingness to assume the carer role.
- 2.36 West Lothian Council also made a similar point as at Question 3, namely that appointment of a judicial reporting or investigating officer could offer a more appropriate response than an FAI. Perth and Kinross Council suggested that (in line with the new duties arising from the Children and Young People (Scotland) Act 2014), it would be better to consider extending the duties on local authorities to conduct a multi-agency review of the circumstances surrounding the death of a child or young person. Similarly, South Lanarkshire Council saw potential in establishing formal dialogue between the Chair of the Local Authority's Child Protection Committee and the Procurator Fiscal's Office to help inform decision making, while the Care Inspectorate pointed to their existing role in reviewing the circumstances of the death of any looked after child.
- 2.37 Those who disagreed, and therefore considered that the requirement for mandatory FAIs should cover other forms of residential accommodation, frequently made the straightforward point that all child deaths in residential care should be investigated through an FAI. The Association of Personal Injury Lawyers suggested mandatory FAIs would be appropriate in any situation where the state or an agent of the state is in a position of care or control. The EHRC was of the view that:

“Mandatory FAIs should also include those children not in ‘secure care’ who are otherwise required to live away from home. This would include children subject to a child protection order or

supervision requirement, or any other order or requirement that the child be kept in, or taken to, a place of safety or residential establishment.”

**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?**

- 2.38 Questions 5a and 5b addressed the death of a person subject to a compulsory detention order under the Mental Health (Care and Treatment) (Scotland) Act 2003. Lord Cullen 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.
- 2.39 Although the Government accepted the principle of an independent investigation, it considers that there should continue to be some discretion to determine whether an FAI is appropriate in particular cases. The consultation paper explains that the crucial distinction is between an independent investigation and a full judicially-led hearing in the form of an FAI. It 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.
- 2.40 Although Questions 5a and b set out an 'either or option' not all respondents answered in this way, with a small number of respondents answering either 'yes' or 'no' at both questions and others answering only one of the questions. Nevertheless, the figures set out in Table 6 below suggest that the majority preferred the option described at Question 5a, the independent investigation by the procurator fiscal with the Lord Advocate retaining his traditional role.

**Table 6: Question 5a & 5b - Response by Respondent Type**

Respondent Type	5a			5b		
	Yes	No	N/A	Yes	No	N/A
Insurance industry bodies or firms	1	-	3	-	1	3
Legal bodies or firms	6	3	5	1	8	5
Local authorities	4	1	2	2	3	2
Public bodies	4	4	7	8	1	6
Representative groups	2	-	7	2	2	5
Total Organisations	(17)	(8)	(24)	(13)	(15)	(21)
Individuals	3	-	5	0	2	6
<b>TOTAL</b>	<b>20</b>	<b>8</b>	<b>29</b>	<b>13</b>	<b>17</b>	<b>27</b>

- 2.41 Sixteen respondents made a further comment at Question 5a and seventeen at Question 5b. Given that a number of respondents either cross-referenced between questions or made all their comments at one of the questions, the analysis presented below covers both questions.
- 2.42 Those respondents who expressed a preference for an investigation by the procurator fiscal and exercise of discretion by the Lord Advocate on completion of that investigation to instruct a FAI (Option A) sometimes simply noted that the current arrangements appear to work satisfactorily and hence should not undergo significant change.
- 2.43 Other points made in support of Option A included that an element of discretion as to the type and level of investigation should be retained. It was also suggested that there should be consistency in the approach used to investigate all deaths of mental health patients who have been compulsorily detained and that Option A offers this consistency. However, some respondents did suggest that, in line with Lord Cullen's recommendation relating to compulsory detention, there may be a case for making the FAI mandatory.
- 2.44 In expressing its concerns about Option A, the Mental Welfare Commission for Scotland suggested that holding an FAI for all of those subject to detention under the Mental Health (Care and Treatment) (Scotland) Act 2003, would be disproportionate, could be distressing for families and would risk diverting attention from other deaths which may be more appropriate for investigation.
- 2.45 The positive case put forward in support of a case review investigation by a public authority such as the Mental Welfare Commission or a different health board (Option B), included that it would appear to offer greater transparency. It was also suggested that an 'expert authority' such as the Mental Welfare Commission could provide a higher level of scrutiny and, by extension, ensure that all areas where practice could be improved are identified. Very much in line with this view, the Royal College of Psychiatrists reported that there is strong support for this option from within their membership. The College went on to note that there is already a requirement to report suicides, sudden

unexplained deaths and deaths where there is a concern about healthcare contributing to the death to the procurator fiscal and that the discretionary power to have a FAI would offer sufficient safeguards. They further noted that would be little public interest in having an automatic FAI for a patient who is has been compulsorily detained but who dies an expected death from an unrelated physical health problem and that:

“Making an FAI mandatory in all such cases was viewed as unduly legalistic, in that it will impose large numbers of elaborate, expensive and drawn-out judicial procedures upon families, clinicians and services with no discernible benefit in prospect to justify it.”

- 2.46 In their extensive comments, both the SHRC and EHRC noted the need for any investigation or review to comply with Article 2 of the European Convention on Human Rights. The SHRC clarified that there is a particular obligation to provide explanations for deaths in custody or detention and that the Court of Human Rights also recognises the need for increased vigilance in reviewing cases where someone is in a position of inferiority and powerlessness, such as if confined in a psychiatric hospital. They went on to set out that Article 2 compliance requires: independence; effectiveness; promptness and reasonable expedition; public scrutiny; involvement of next of kin; and to have been initiated by the State. They concluded that:

“...the second option [Option B] could comply with Article 2 requirements if implemented in the following form: an initial investigation by an independent public body to rule out deaths from natural causes; in all other circumstances, a mandatory FAI would be triggered.”

- 2.47 In its own response, the Mental Welfare Commission for Scotland also commented on how any possible arrangements would work in practice, reporting that they believe the current system to be confusing. For example, they pointed out that at present the procurator fiscal is not notified of every death of a patient and that the Crown Guidance to medical practitioners specifies that suicides and deaths in legal custody should be notified but does not specify deaths whilst under mental health detention. They also noted that there is a separate system for notification of suicides to Healthcare Improvement Scotland and that there is also a system of local case review by clinical services. The Commission’s proposed solution includes a statutory requirement to notify any death of a patient subject to a compulsory order under the Mental Health (Care and Treatment) (Scotland) Act 2003 to the procurator fiscal and the Mental Welfare Commission. Their response<sup>3</sup> sets out further detail on the proposed approach, also noting that:

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<sup>3</sup> Along with other published responses this is available on the Scottish Government’s website at: <http://www.scotland.gov.uk/Publications/2014/10/8764>

“Following such notification, the Commission would undertake a review of the case notes by a medically qualified person, to determine if there are any factors requiring more detailed investigation. If there are, a Commission investigator would initiate a more formal review....The MWC would keep the fiscal advised throughout the process, and would advise the fiscal if it believed there were grounds for an FAI, either instead of or following the review overseen by the MWC. The Lord Advocate would retain full discretion to initiate an FAI at any stage.”

- 2.48 Other respondents also raised issues that required further clarification, although some of these focused more on the definition and scope of compulsory detention rather than the specific options. On this point the principal issue was whether individuals subject to community-based compulsory treatment orders, suspension of detention and welfare guardianship orders may also fall within the definition of compulsory detention. On a connected point it was suggested that consideration should be given to extending the proposed approach to cover the death of patients who have recently been discharged from detention and to voluntary patients in psychiatric hospitals. The case made was that otherwise such deaths may not be the subject of any inquiry even where they might raise questions of wider public interest.
- 2.49 The EHRC and the Scottish Prison Service raised the issue of prisoner deaths and their concerns that an FAI for all prisoner deaths may not be appropriate or necessary. Noting that the death of a prisoner may be clearly due to natural causes, both respondents suggested there would be no wider public interest in holding a FAI. This led the EHRC to conclude that an approach similar to Option B could be better suited to reviewing the death of prisoners and that a body such as Healthcare Improvement Scotland might have the necessary expertise and experience to carry out the investigations.
- 2.50 However, some other respondents had reservations about Option B. For example, the Care Inspectorate saw merit in the option but went on to report that their experience suggests there can be issues when deaths may be investigated by public authorities which are subsequently involved as parties to an FAI, and which may be subjected to criticism in the course of that FAI.
- 2.51 Other concerns included that Option B would not command a sufficient level of respect and the powers available would be less than those available to the Lord Advocate in an FAI. It was also suggested that the resources of an organisation such as the Mental Welfare Commission could be put under considerable strain.
- 2.52 Finally, a small number of respondents saw potential in both approaches being available. For example, South Lanarkshire Council suggested that although they are presented as alternatives, the discretionary powers offered with Option B could be useful in some cases and consideration should be given as to allowing them to sit alongside Option A. It was also suggested that there would be nothing to preclude a review being held in addition to the Crown’s investigations.

**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?**

- 2.53 Thirty four respondents commented on the impact the mandatory categories proposals could have on themselves as individuals, their organisation or their community.
- 2.54 A number of respondents were of the view that the proposals would have minimal or no impact on themselves or the area in which they worked. Those taking this view included the four Insurance Industry Respondents and a number of those associated with the legal profession and the justice system. For example, the Society of Solicitor Advocates expected there to be no impact, whilst others suggested any impact would be minimal. Some of those who suggested a minimal impact pointed to a possible small increase in the number of FAI cases with Sheriff Crowe anticipating a small impact of one or two cases a year. The Sheriffs' Association summed up a common view as follows:
- “While we must be cautious in expressing a view without the necessary data re. the anticipated number of cases, in our opinion the recommendations to extend the mandatory categories of death (to include persons arrested or detained by police and children in secure care) should not result in a significant increase in levels of FAI business.”
- 2.55 A number of other respondents also pointed to the possibility that they would be involved in more FAIs. For example, West Lothian Council noted that if the deaths of children in secure care were to be included in the mandatory category then they are likely to be represented in more FAIs. Some respondents saw the potential for their involvement to increase significantly. For example, the Mental Welfare Commission for Scotland noted that taking forward the option outlined at 5b (above) would have an impact on them. Whilst suggesting that the increase in costs to the Commission would be likely to modest they also pointed to the need to find the necessary resources. The Care Inspectorate also noted that this option could have resource implications for their organisation.
- 2.56 Also commenting on the resourcing issue, HSE suggested that the proposals will increase the number of FAIs to which HSE gives evidence, and thereby increase pressure on HSE's resources. The Scottish Legal Aid Board noted that, if amendment of the mandatory categories results in investigations into a greater number of deaths, this could impact on expenditure from the Legal Aid Fund. The Board further noted that with an estimated 75% of the Scottish population qualifying for civil legal aid an increase in the number of mandatory FAIs would be likely to increase expenditure incurred against the Fund.
- 2.57 Finally on the resourcing theme, Victim Support Scotland highlighted that increasing the categories for which an FAI is mandatory will result in an increase in the number of witnesses and bereaved friends and relatives who may require support. They went on to explain that their current funding does

not cover services for families taking part in FAIs but that, if their remit were to be extended, these resource implications would need to be addressed.

- 2.58 A small number of respondents commented on the possible impact of the proposals on bereaved families and of the benefits of greater openness, including better information being available to relatives and friends affected by the death. Two respondents particularly noted the potential impact on the families of a Scottish national who has died abroad under suspicious or unexplained circumstances (this issue is the focus of Section 3). Others commented on the positive impact of the proposals if they resulted in further deaths being avoided, although the Care Inspectorate had concerns that the adoption of Option B could have a negative impact for vulnerable people if it led to delays in regulatory action.
- 2.59 Finally, a small number of respondents expressed their disappointment at the likely impact of the proposals put forward. SCID felt the proposals will have little will have little or no impact on families bereaved by road collisions, whilst the STUC commented that if mandatory FAIs into deaths as a result of occupational disease had been proposed this could have helped reduce exposure to occupational disease and the resultant needless deaths.

### **3 DEATHS ABROAD**

- 3.1 The consultation paper notes that, 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.
- 3.2 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. He 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.
- 3.3 The Scottish Government accepted this recommendation and proposes 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 has been 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?**

- 3.4 Question 7 asked if the Lord Advocate should 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. The overwhelming majority of those who answered this question agreed that the Lord Advocate should have this discretion. Responses are summarised in Table 7 below.

**Table 7: Question 7 - Response by Respondent Type**

<b>Respondent Type</b>	<b>Yes</b>	<b>No</b>	<b>Not Answered No View</b>	<b>Total</b>
Insurance industry bodies or firms	-	-	4	4
Legal bodies or firms	10	-	4	14
Local authorities	3	-	4	7
Public bodies	7	1	7	15
Representative groups	5	-	4	9
<b>Total Organisations</b>	<b>(25)</b>	<b>(1)</b>	<b>(23)</b>	<b>(49)</b>
Individuals	6	-	2	8
<b>TOTAL</b>	<b>31</b>	<b>1</b>	<b>25</b>	<b>57</b>

3.5 Twenty respondents made a further comment. Points raised included that, as is already the case in England and Wales, it would be appropriate to have powers in relation to deaths abroad for Scotland, particularly as Scots travel and work abroad in increasing numbers. However, it was also noted that any powers are not likely to be used extensively and only on the basis of public interest considerations. For example, it was suggested that any recommendations made regarding activity or travel abroad might minimise the risk of the occurrence of a similar death in the future. The STUC noted their particular interest in work-related deaths of UK citizens occurring abroad.

3.6 Other respondents also commented on the conditions under which such an FAI might be held, generally noting their agreement to the caveats outlined by Lord Cullen. Bob Doris MSP suggested that:

“...the Lord Advocate’s decision should, except in very exceptional circumstances, be informed by a post-mortem, a family statement, and recovery of any relevant documents from the country of death.”

3.7 A small number of respondents noted issues that will need to be considered or addressed if introducing this proposal. These were:

- Primary legislation to define the circumstances in which such a power could or should be exercised will be required.
- Information regarding the range and capacity of the inquiry, including any problems which may occur in respect to cross-border co-operation, should be given to bereaved families to ensure that they have realistic expectations.
- In cases where an FAI is not deemed necessary, bereaved families will still need support, possibly from Victim Support Scotland but also from police liaison officers.

3.8 Finally, other notes of caution were introduced, including that bereaved families may indeed have an expectation that an FAI will deliver more than is likely to be the case and that, in reality, an FAI may result in little more than a

formal finding of place, time and manner of death. The Police Investigations and Review Commissioner suggested that little is likely to be gained from introducing these proposals and that if a country has not undertaken a competent investigation it will also be unlikely to co-operate with an FAI held in Scotland.

**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.**
- (II) Whether there had been a satisfactory investigation (in the country where the death took place).**
- (III) Whether there was a prospect of an FAI yielding significant findings.**

- 3.9 Amongst those respondents who answered question 7a, the majority agreed with all three of the criteria suggested, although a small number did not agree with the second criterion. Responses are summarised in Table 8 below.

**Table 8: Question 7a - Response by Respondent Type**

Respondent Type	(I)			(II)			(III)		
	Yes	No	N/A	Yes	No	N/A	Yes	No	N/A
Insurance industry bodies or firms	-	-	4	-	-	4	-	-	4
Legal bodies or firms	8	1	5	7	2	5	8	1	5
Local authorities	2	-	5	1	1	5	1	-	6
Public bodies	7	-	8	6	1	8	7	-	8
Representative groups	5	-	4	5	-	4	5	-	4
Total Organisations	(22)	(1)	(26)	(19)	(4)	(26)	(21)	(1)	(27)
Individuals	6	-	2	5	1	2	6	-	2
<b>TOTAL</b>	<b>28</b>	<b>1</b>	<b>28</b>	<b>24</b>	<b>5</b>	<b>28</b>	<b>27</b>	<b>1</b>	<b>29</b>

- 3.10 Only six respondents went on to make a further comment. The principle issue raised was in relation to the second criterion - whether there had been a satisfactory investigation (in the country where the death took place) - and how an assessment could be made as to whether a satisfactory investigation had been carried out. For example, The Law Society of Scotland noted that:

“...there will be a requirement for primary legislation to define in clear terms the circumstances in which such a power could or should be exercised. The determination as to when and in what circumstances such an inquiry should be sought must be based solely upon public interest considerations.”

- 3.11 A broader concern was that the criteria could be used as loopholes, providing the Crown with justifications for not carrying out an FAI even if such an FAI might have been worthwhile.
- 3.12 Finally, it was suggested that any decision to hold an inquiry or not should involve the bereaved family and that there should be a duty on the Lord Advocate to provide the family with full explanation if there is a decision not to proceed.

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

- 3.13 Twenty five respondents commented on the impact the proposals could have on themselves as individuals, their organisation or their community. A number of respondents anticipated that there would be little if any impact on themselves or their organisation.
- 3.14 The most frequently raised issues were the practical and resource implications of introducing these proposals. In terms of the practical challenges, the Sheriffs' Association commented on the possible impact on COPFS, not least because of the likely complexity of any enquiries they are undertaking. An example of specific activity that could be required was translation of documentary productions.
- 3.15 In terms of the cost implications, some respondents suggested that these could be high. It was also noted that there could be implications for the Legal Aid budget if increased numbers of people were seeking support for representation in an FAI. HSE noted that there could also be resource implications for their organisation.
- 3.16 Some respondents identified positive impacts that the proposals could have, including that they offered an opportunity to offer support and bring solace to bereaved families at an extraordinarily difficult time. DAYNA explained that:

“Knowing the facts surrounding the death of a loved one can be imperative for bringing ‘closure’ to such an experience.”
- 3.17 It was also suggested that the change would help promote confidence in the Scottish justice system and be compliant with Articles 2 and 8 of the European Convention on Human Rights.
- 3.18 Finally, it was suggested that any learning from FAIs could help protect UK citizens travelling or working abroad, particularly in countries with less developed health and safety systems in place.

## **4 DELAYS**

- 4.1 The consultation paper notes that there has been some criticism in recent years in relation to what are seen as unacceptable delays in holding FAIs, with the main concern being about the time between a death and the resulting FAI taking place. Questions 9-15 of the consultation focused on this issue and, specifically, on delays between the date of death and the start of an FAI, preliminary hearings and other options to speed up an FAI.

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

- 4.2 Incidents resulting in FAIs are likely to involve consideration of criminal proceedings and/or lengthy expert investigations by regulatory authorities. The consultation paper notes that if an independent expert report is required, the instructing, obtaining and consideration of it will take months or longer and that these delays are to a large extent outwith the control of the Crown. The paper also notes that the need to conduct a criminal investigation or an investigation by HSE or an Accident Investigation Branch also means COPFS do not have control of the entire process. Following any inquiries, 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 circumstances of the death have been sufficiently established in criminal proceedings.
- 4.3 Lord Cullen did not recommend time limits for FAIs and in a January 2014 letter to the Cabinet Secretary for Justice wrote 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. That is because of the diversity and potential complexity of the cases, and because other investigations or proceedings may have to be completed first.”

**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?**

- 4.4 The balance of opinion at Question 9 is set out in Table 9 below. A large majority of those respondents who answered this question agreed with Lord Cullen’s view.

**Table 9: Question 9 - Response by Respondent Type**

<b>Respondent Type</b>	<b>Yes</b>	<b>No</b>	<b>Not Answered No View</b>	<b>Total</b>
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	9	3	2	14
Local authorities	6	-	1	7
Public bodies	11	1	3	15
Representative groups	3	3	3	9
<b>Total Organisations</b>	<b>(33)</b>	<b>(7)</b>	<b>(9)</b>	<b>(49)</b>
Individuals	4	1	3	8
<b>TOTAL</b>	<b>37</b>	<b>8</b>	<b>12</b>	<b>57</b>

4.5 Forty five respondents made a further comment, with many (including both those who had agreed and disagreed at Question 9), noting their concern about unacceptable delays. The Association of Personal Injury Lawyers was amongst those expressing concerns that the recommendations already implemented to reduce delays are not working and that unsatisfactory delays are the norm at present. They were amongst the respondents who cited specific examples of currently delayed cases or of historic FAIs that have taken many years to reach their conclusions. The implications of these delays were also highlighted, and in the context of work-related deaths Unite suggested that:

“The failure to hold a FAI in a time-bound manner allows the continuation of potentially fatal working conditions and practices to continue undiagnosed and therefore unresolved - increasing the possibility of repeated fatal accident occurrence.”

4.6 Other examples given of the possible damage that can result from FAIs being delayed included that physical evidence may deteriorate over time and that witnesses may struggle to recall events that happened a number of years ago.

4.7 The potential complexity of many cases was also noted, although the Police Investigations and Review Commissioner pointed out that not all cases will be complex. Nevertheless, some respondents highlighted the variety of factors - such as a death occurring abroad - which can slow progress and contribute to a delay. Other respondents commented on procedural issues which can contribute to delays. For example, the Scottish Court Service suggested that time limits could have the unintended consequence of requiring hearings to be adjourned if parties are not fully prepared. Other specific reasons given for delays occurring included:

- HSE reported that its investigations can be delayed because of the need for police to exclude breaches of the Corporate Manslaughter and Corporate Homicide Act 2007. The police retain "primacy" for these investigations, meaning HSE can find it difficult to influence the pace of the investigation.

- NHS National Services Scotland commented that their Central Legal Office often receives very short notice of the need to attend an FAI and hence has to seek an adjournment to allow investigations to continue.
  - NHS National Services Scotland also noted that it may only be at a late stage that witnesses realise that they are the subject of criticism by the Crown and that at this stage they make take the decision to seek legal representation, again resulting in adjournment.
- 4.8 A particular concern was the distress these delays may cause and many of those who either took no view or did not agree with the introduction of mandatory timescales stressed that delays must be minimised and FAIs held as soon as practically possible. A small number of respondents also stressed the importance of keeping families or other interested parties informed and given information on the FAI process as soon as possible.
- 4.9 Reasons given for not supporting mandatory timescales included that: an FAI is not usually heard before any potential criminal trial is concluded; many of the investigative bodies are reserved organisations and thus beyond the control of the Lord Advocate; and given their finite resources, imposing unrealistic timescales on COPFS could undermine the quality of their investigations. Concerns were also raised that imposing time limits could simply result in FAIs being opened on a mandatory date, but then adjourned. The Scottish Court Service suggested that strict time limits would limit their flexibility to programme the most appropriate accommodation, judicial expertise and services for the court hearing.
- 4.10 Many of those who did not support mandatory timescales still offered suggestions for improving the current approach. Suggestions often focused on the need for transparency and clarity. For example, the Mental Welfare Commission for Scotland would like to see:
- “...a clearer and more transparent decision making process with timescales for relevant stages, to reduce the risk of pressure of other business in the COPFS or elsewhere holding up the final decision.”
- 4.11 Specific suggestions made included:
- Legislation should set out that the Crown will use its best endeavours to bring the matters to court at the earliest opportunity. The Sheriffs Principal suggested that this would enable the judicial bench to make enquiries if there were concerns about the time taken to make progress with a case.
  - In non-complex cases, it would be realistic to set a notional timescale for opening an FAI, along with an interim date for reviewing the feasibility of adhering to that date.
  - Consideration should be given to setting a maximum period between the date of death and the point at which a Petition to hold an FAI would

require to be presented if the Crown wished to reserve the option to proceed with an inquiry even if investigations are incomplete. An alternative suggestion was for a maximum period between the date of death and the commencement of an FAI, subject to extension on cause shown. However, the Care Inspectorate noted that consideration would have to be given to the potential for FAIs to become “time-barred” in a way which operated to the detriment of the public interest.

- There could be an option whereby a timescale ran from the conclusion of a criminal trial (or when the Procurator Fiscal decides not to bring criminal charges) or completion of investigations by other agencies (such as HSE). This suggestion was made by the 4 Insurance Industry Respondents.
- More specifically, the Forum of Insurance Lawyers (Scotland) suggested a time limit should be set for a decision by the Lord Advocate as to whether an FAI is to be held or not. They went on to suggest that one way of balancing the Lord Advocate’s need for adequate time to consider the position with the interests of the public in not allowing unreasonable delays to occur would be to provide a ‘backstop’ such as a report to an Outer House judge. The Forum also suggested that the Lord President could nominate a Court of Session judge to take a supervisory role in the process.
- An early formal investigation review process, involving the police, HSE and COPFS. Part of their considerations would be around minimising delay. In support of this suggestion, HSE noted that this tripartite approach is encouraged in Work-related Deaths: A Protocol for Liaison.<sup>4</sup>
- The Scottish Government should issue guidance to help prevent undue delay. More specifically, guidance for less complex deaths in custody, especially where the cause of death is determined as natural causes at post-mortem, was suggested by the Scottish Prison Service.
- There should be a procedure for keeping families updated and made aware of the reasons for any delays.

4.12 Those who disagreed with Lord Cullen and by extension thought that mandatory timescales should be introduced, raised a similar range of issues, although sometimes drew different conclusions about the best way forward. Specific comments included:

- Much greater transparency is required and processes must focus on serving the public interest, whilst also doing everything possible to involve the families of victims. This very much echoed the views set out at 4.9 above. Unite suggested that, in the first instance, this should involve written clarification from the Lord Advocate when exercising his powers in relation to an FAI. There should also be avenues by which families can challenge that decision-making.

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<sup>4</sup> Available at: <http://www.hse.gov.uk/scotland/workreldeaths.pdf>

- There are many other areas of the law in which time limits already exist, such as bringing of prosecutions or holding inquests and, while time limits may be arbitrary, they could also bring focus.
  - There could be target dates based on the complexity of the FAI.
  - There should either be a preliminary hearing, which would be adjourned or an FAI should open within a certain length of time from the date of death. This would ensure judicial oversight begins early in the process.
- 4.13 Three Trade Union Respondents to the consultation (RMT, STUC and Unite) expressed strong concerns about the current proposals and correspondingly strong support for the proposals in Patricia Ferguson MSP's Inquiries into Deaths (Scotland) Bill. The STUC and RMT suggested that the Lord Advocate should decide whether an FAI should take place within 6 months of the date of death, with the STUC noting an alternative option of one month after the conclusion of court proceedings. The RMT proposed a requirement for a preliminary hearing to be held within 2 months of an FAI being granted.
- 4.14 In recognition that exceptional circumstances could arise, the STUC and RMT, along with Action against Medical Accidents, suggested that there could be discretion to extend time limits, although a full justification for the need to do so should be made public and the case closely managed to ensure a conclusion is reached.

### **Preliminary hearings**

- 4.15 Lord Cullen recommended that a preliminary hearing should be heard in each case and it is proposed that preliminary hearings should become standard practice unless the sheriff dispenses with it if, for example, the outcome of the FAI is likely to be purely formal. The Scottish Court Service 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.

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

- 4.16 All of the respondents who answered this question agreed that preliminary hearings should be held to help speed up the process of FAIs.

**Table 10: Question 10 - Response by Respondent Type**

<b>Respondent Type</b>	<b>Yes</b>	<b>No</b>	<b>Not Answered No View</b>	<b>Total</b>
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	13	-	1	14
Local authorities	6	-	1	7
Public bodies	11	-	4	15
Representative groups	5	-	4	9
<b>Total Organisations</b>	<b>(39)</b>	<b>-</b>	<b>(10)</b>	<b>(49)</b>
Individuals	5	-	3	8
<b>TOTAL</b>	<b>44</b>	<b>-</b>	<b>13</b>	<b>57</b>

- 4.17 Thirty eight respondents provided an additional comment at this question, with a number making a broad statement in support of the use of preliminary hearings and their potential to lead to a quicker process and, possibly, to shorter and more focused FAIs. Many respondents also noted that preliminary hearings are already used in a number of other types of proceedings or pointed to the apparently successful use of preliminary hearings for FAIs in Edinburgh and Glasgow sheriff courts.
- 4.18 Many respondents commented on the potential benefits of holding preliminary hearings, with a number focusing on the potential of administrative and practical matters being dealt with early on, allowing subsequent efforts to focus on the most important issues. For example, the Sheriffs' Association suggested that:
- “The first preliminary hearing should take place well in advance of the FAI in order to get interested parties around the table and focus the issues. Further hearings can monitor progress and deal with issues such as the identification of uncontroversial evidence and the position regarding the citation and availability of witnesses.”
- 4.19 Other benefits suggested included that early discussion of evidence would help prevent parties being ‘ambushed’ by lines of evidence during the FAI and that the court would be able to make recommendations about lines of potential evidence. One Individual Respondent commented that they should include input from relatives or representatives regarding any unusual events or incidents they feel need to be addressed.
- 4.20 Some respondents raised issues that would need to be considered should preliminary hearings be introduced. For example, it was suggested that issues of cost and resourcing may need to be looked at and a small number of respondents commented on the need to consider the preliminary hearing process from the perspective of families of victims. In particular, one Legal Firm Respondent ( Pinsent Masons LLP ), suggested that the purpose of the preliminary hearing must be clearly explained to the family to avoid situations where family members attend only to be disappointed at the lack of discussion about the facts of the case. It was also suggested that an intermediate

hearing could be held at the completion of any criminal proceedings and used to inform both families and COPFS as to when the FAI is likely to be held.

- 4.21 Two respondents raised specific concerns in relation to preliminary hearings. HSE suggested that from a resource perspective, and based on their experience in England and Wales, the timing and content of the hearings will need to be controlled. The RMT was concerned that the procedural details for Preliminary Hearings have yet to be drawn up. They sought clarification as to when these will be available and suggested that a further public consultation on them would be required.
- 4.22 A small number of other respondents also raised specific points about the procedures for holding preliminary hearings. The Law Society of Scotland commented that a formal set of procedural rules of court, including rules for the conduct of preliminary hearings, would be appropriate. The Sheriffs Principal concurred, suggesting that the Sheriff Principal Practice Notes be replaced by Rules of Court. The Law Society of Scotland went on to suggest that, in addition to being published on the Scottish Court Service website, the Rules should also be published in the volumes of Criminal and Civil Court Statutes.
- 4.23 There was also some support for the use of technology, in particular for case management conferences being held by telephone and email being used for other exchange of information. It was also suggested that preliminary hearings would give the courts an early intimation of special requirements for witnesses, for example, the use of video links or other technology.
- 4.24 Finally, the STUC restated their support for Patricia Ferguson MSP's proposal that FAIs should commence ahead of any criminal proceedings and be adjourned if necessary.

### **Other options to speed up FAIs**

- 4.25 The remaining questions in the Delays section considered other options for speeding up FAIs. They covered: pre-hearing meetings of experts; hearing some business in sheriffs' chambers; the submission of evidence in advance; and transferring cases to a different sheriffdom.

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

- 4.26 A large majority of the 37 respondents who answered Question 11 agreed that having pre-hearing meetings of experts would help speed up FAIs. Responses are summarised in Table 11 below.

**Table 11: Question 11 - Response by Respondent Type**

<b>Respondent Type</b>	<b>Yes</b>	<b>No</b>	<b>Not Answered No View</b>	<b>Total</b>
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	11	-	3	14
Local authorities	4	-	3	7
Public bodies	7	1	7	15
Representative groups	6	1	2	9
<b>Total Organisations</b>	<b>(32)</b>	<b>(2)</b>	<b>(15)</b>	<b>(49)</b>
Individuals	3	-	5	8
<b>TOTAL</b>	<b>35</b>	<b>2</b>	<b>20</b>	<b>57</b>

- 4.27 Forty respondents made a further comment, including a small number who had not given a direct answer at Question 11. Many comments were succinct and offered support for improving the speed and efficiency of FAIs. The Sheriffs' Association was amongst those suggesting that focusing on the issues at an early stage:

“...will prevent court time being taken up with hearing expert evidence which is not in contention and will also mean that experts do not require to be recalled to comment on fresh issues.”

- 4.28 As an organisation that themselves are required to provide expert input, HSE agreed that identifying areas of agreement and disagreement will be beneficial and went on to suggest it would improve the quality of evidence presented to the sheriff. Echoing this view, the Scottish Prison Service reported that when involved in FAIs they sometimes find there to be a lack of understanding of prison regimes and policies, and that these could be addressed in a pre-hearing meeting of experts. They also noted that they would encourage experts and the sheriff to visit establishments where the death occurred.

- 4.29 Other specific benefits identified included avoiding the stress caused to families of listening to experts and lawyers arguing over specific points, helping ensure that expert reports are received sufficiently early in the inquiry process, and allowing for the early identification of any expert points in dispute. However, it was also noted that the process of identifying and instructing the appropriate expert is often not straightforward, particularly in the case of medical deaths. This led Action against Medical Accidents to call for specialist training and advice to be made available to procurators fiscal.

- 4.30 On a procedural point, it was suggested that any meetings would need to be structured appropriately and that judicial supervision might or would be required.

- 4.31 A small number of respondents commented that pre-hearing meetings would not be appropriate in all cases and hence should either not become general

practice or should not be mandated. The Faculty of Advocates summarised their position as follows:

“...on the evidence available to us we do not consider that adopting a rule or general practice whereby a joint meeting of experts is directed would be generally consistent with the overriding objective of doing justice in a proportionate and economic manner without unnecessary delay.”

- 4.32 As above, other concerns included whether pre-hearing meetings would bring sufficient benefit to justify the costs incurred. In particular, the Faculty of Advocates noted that there is no data or measure which can be used to assess whether the pre-hearings used in other contexts actually save court time. They also reported that, anecdotally at least, some Scottish practitioners take the view that such joint meetings between experts generally significantly increase the costs of litigation.
- 4.33 Others who disagreed or had reservations about the proposition suggested that adding pre-hearing meetings could simply postpone the date of the FAI or could undermine the principles that an FAI must be an open and transparent inquiry. In particular, SCID expressed concerns about expert evidence being provided only for the use of COPFS and stressed that any evidence presented at pre-hearings should be available to the court and, if they wish, to families. Other respondents stressed that bereaved families must be made fully aware of any pre-hearing meetings, including both their purpose and any outcomes.

**Question 12: Will hearing some business in sheriffs' chambers help speed up FAIs?**

- 4.34 Relative to many other questions, views on whether hearing some business in sheriffs' chambers would help speed up FAIs were mixed. Although the majority of respondents thought it would, Insurance Industry and a number of Legal Body or Firm respondents disagreed. Responses are set out in Table 12 below.

<b>Table 12: Question 12 - Response by Respondent Type</b>				
<b>Respondent Type</b>	<b>Yes</b>	<b>No</b>	<b>Not Answered No View</b>	<b>Total</b>
Insurance industry bodies or firms	-	4	-	4
Legal bodies or firms	4	6	4	14
Local authorities	4	-	3	7
Public bodies	8	3	4	15
Representative groups	3	1	5	8
<b>Total Organisations</b>	<b>(19)</b>	<b>(14)</b>	<b>(16)</b>	<b>(49)</b>
Individuals	4	-	4	8
<b>TOTAL</b>	<b>23</b>	<b>14</b>	<b>20</b>	<b>57</b>

- 4.35 Thirty three respondents made a further comment. Those who supported the hearing of some business in sheriffs' chambers sometimes referred to the use of any appropriate premises as simply being a common sense approach. However, not all respondents, amongst them the Law Society of Scotland, were convinced that using sheriffs' chambers in this way would help speed up FAIs to any significant degree or in very many cases. Others sought more information before being able to offer their support.
- 4.36 Again, the importance of ensuring that the process is open and transparent, and especially of ensuring that relatives have appropriate access to proceedings were raised. This included by some respondents who disagreed with the use of sheriffs' chambers because they did not believe it would allow for a sufficiently open and transparent process. The Sheriffs' Association was amongst those taking this view, concluding as they did that the benefits of less formality had to be balanced with concern about parts of the process not being open to the public.
- 4.37 In contrast, it was suggested that there may be occasions, such as when feelings are running high, when holding a discussion in chambers may be preferable to holding it in the open court and that meetings in chambers could also reduce opportunities to adopt an adversarial approach. The Society of Solicitor Advocates took a slightly different view in suggesting that matters should not be dealt with in chambers unless with the agreement of all parties.

**Question 13: Do you agree to the proposal of permitting the submission of statements to the sheriff in advance of the FAI?**

- 4.38 Of the 40 respondents who answered this question, a significant majority agreed with permitting the submission of statements to the sheriff in advance of an FAI. Responses are summarised in Table 13 below.

<b>Respondent Type</b>	<b>Yes</b>	<b>No</b>	<b>Not Answered No View</b>	<b>Total</b>
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	8	3	3	14
Local authorities	5	1	1	7
Public bodies	7	2	6	15
Representative groups	5	1	3	9
<b>Total Organisations</b>	<b>(29)</b>	<b>(7)</b>	<b>(13)</b>	<b>(49)</b>
Individuals	3	1	4	8
<b>TOTAL</b>	<b>32</b>	<b>8</b>	<b>17</b>	<b>57</b>

- 4.39 Thirty two respondents made a further comment. As at some other questions in this section, some respondents offered their support for measures which will help minimise delays to the FAI process. More specifically, Sheriff Crowe noted that significant court time has been wasted due to the lack of or incomplete disclosure by parties and the Scottish Legal Aid Board considered

that allowing the submission of statements in advance should reduce the amount of court time needed in respect of certain evidence. They were also amongst those noting that an equivalent approach seems to operate satisfactorily in other parts of the UK. The Forum of Insurance Lawyers (Scotland) summed up their position as follows:

“Given that the FAI is not an adversarial forum and is essentially a fact-finding exercise then the more which can be done to encourage early sharing of evidence and information is to be commended.”

4.40 Specific benefits identified included that:

- It would allow some evidence to be submitted without the necessity of a witness attending the court.
- Bereaved families would benefit from being able to pre-prepare their statement with the fiscal and this could help make the whole process less traumatic for them.
- The submission of statements may identify circumstances where there is no requirement for an FAI hearing and the sheriff can provide a determination only.

4.41 Some respondents sought clarification as to the detail of the proposal and, in particular, the types of statements being referred to and who would be entitled to submit statements. The Faculty of Advocates gave their support if the proposal refers to statements of evidence. The Medical and Dental Defence Union of Scotland supported the approach for formal and non-controversial evidence, while the Association of Personal Injury Lawyers suggested that advance submission of statements may not be appropriate if the FAI is dealing with very complex or controversial issues. A Legal Firm Respondent (Peacock Johnston, Solicitors), supported of a permissive, non-mandatory approach.

4.42 As at a number of other questions, some respondents stressed the importance of processes being open, transparent and inclusive. For example, HSE suggested that statements should be circulated to all participants to enable scrutiny of all witness evidence. Action against Medical Accidents stressed that statements should be available to families at an early stage and that they should have the right to ask additional questions. The STUC was concerned that permitting written statements should not remove the opportunity to cross-examine witnesses.

4.43 Other notes of caution expressed included that care must be taken to avoid unnecessary and excessive costs being incurred, whilst one individual respondent opposed the use of written statements because he felt that written statements could have resulted in a possible misinterpretation in a case in which he had been involved.

- 4.44 Finally, a small number of respondents either had very strong reservations about or opposed the proposal because they saw it as being at conflict with a system based on oral advocacy and examination under oath, with one Legal Firm Respondent (BLM LLP) noting that assessments of witness credibility and reliability are made against this backdrop. The Law Society of Scotland also had concerns that:

“...much would depend on who prepared the statements, their standard and what weight if any can be attached to a statement in comparison to oral evidence.”

**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?**

- 4.45 All but 2 of the respondents who answered this question agreed that the sheriff principal should be able to transfer a case to a different sheriffdom if this was thought appropriate and might speed up the holding of the FAI. Responses are set out in Table 14 below.

Respondent Type	Yes	No	Not Answered No View	Total
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	11	1	2	14
Local authorities	6	-	1	7
Public bodies	11	-	4	15
Representative groups	6	1	2	9
Total Organisations	(38)	(2)	(9)	(49)
Individuals	4	-	4	8
<b>TOTAL</b>	<b>42</b>	<b>2</b>	<b>13</b>	<b>57</b>

- 4.46 Thirty three respondents made a further comment, although many of these were brief and again focused on general support for measures to help speed up the holding of FAIs. In giving their support, the Scottish Court Service commented that this approach:

“...will enable overall best use of the Scottish court estate, shreival expertise and availability.”

- 4.47 In contrast, the Sheriffs' Association, along with the STUC, disagreed with the proposal. The STUC suggested that it should be for sheriffs to move to an appropriate location for the inquiry. The Sheriffs' Association took the view that:

“...the focus should be on ensuring suitable resources locally to allow FAIs to be heard in the local community rather than

transferring cases to other sheriffdoms in order to speed up the process.”

- 4.48 A number of respondents commented that consideration would need to be given to the wishes of and impact on bereaved families, as well as the impact on witnesses and any staff who may be required to attend the FAI. There was an associated suggestion that any expenses incurred by bereaved families as a result of a transfer should be covered. It was also suggested that most potential lies in making transfers only to neighbouring jurisdictions thus limiting the impact on those needing to attend.
- 4.49 There were some reservations, including from a small number of the respondents who had given their overall support to the proposal. Issues raised included that:
- Transfers could lead to some dilution of the principle that justice should be local.
  - It will be important to ensure that the FAI is being transferred to a sheriff who has undergone the required training and has the necessary expertise to conduct an FAI.
  - Consideration should be given to whether the transfer could result in a loss of local knowledge from any of the parties involved, including the sheriff.
  - In contrast, it was suggested that there may be occasions when medical death FAIs could actually benefit from being transferred to a different sheriffdom, thus avoiding any risk of local prejudice.
- 4.50 Finally, both the Scottish Court Service and the Sheriffs Principal recommended that the mechanism for transfers should be set out in court rules.

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

- 4.51 Thirty six respondents made a comment at Question 15. Irrespective of their area of interest or specialism, respondents most frequently pointed to a quicker outcome being of benefit to all involved but especially to bereaved families at what will be a very stressful and distressing time.
- 4.52 It was also recognised that others involved, including medical professionals who may have been involved in a medical death for example, can find the process very difficult and would benefit from a more speedy resolution. The Scottish Prison Service noted that the current delays have a negative impact on their staff, along with their families and that this can lead to sick absence due to stress and anxiety.
- 4.53 The other frequently identified and positive impact was ensuring that any lessons are learned as soon as possible, thus reducing the likelihood of

similar incidents occurring and, most critically, avoiding unnecessary deaths in the future. From an organisational perspective, the Care Inspectorate suggested that learning from FAIs could help them in carrying out their statutory function.

- 4.54 Those commenting on the impact on the court system and processes, along with those working within it, raised a range of issues. The Scottish Court Service was of the view that preliminary hearings and possible transfer between sheriffdoms could offer significant improvements, while Sheriff Crowe was of the view that little extra work would be required for the benefits likely to be accrued. Other points raised included:
- Holding inquiries as soon as possible could help in the recovery and preservation of relevant evidence.
  - A more efficient and quicker process should permit savings of staff time and public money within agencies such as HSE.
  - Other resources could be saved, including if fewer costs are incurred in representations. It was also suggested that reduced costs could result in savings to the Legal Aid budget.
  - In contrast, it was suggested that there could be additional cost implications associated with transferring FAIs between courts, particularly in terms of providing accommodation for witnesses.
- 4.55 A small number of respondents also highlighted possible resource issues within other organisations. For example, NHS National Services Scotland, whilst wholeheartedly supporting speeding up the processes, also noted that it would need:
- “...to consider whether its current establishment of solicitors would be sufficient to allow their clients’ interests to be properly represented if FAIs were to come up with less notice.”
- 4.56 A Legal Firm Respondent (DAC Beachcroft (Scotland) Solicitors), suggested that the resources available to COPFS would also need to be considered; they were concerned that communities could feel an impact if the changes affected COPFS resources available for the prosecution of crime. On a more specific point, the Sheriffs’ Association pointed out that increased case management would require ‘front end loading’ of resources, with the FAI sheriff needing to be available to cover preliminary hearings and read all relevant documentation. They also suggested that specialist clerks may be required. They concluded that:
- “There may be an initial bottleneck of cases if these changes are introduced alongside the imposition of a prescriptive period.... However, the investment of resources at this point in the FAIs will result in a significant saving of court time devoted to hearing FAIs.”

- 4.57 Finally, a small number of respondents noted that although holding FAIs more quickly would have positive impacts, this must not be at the expense of a thorough and well conducted FAI.

## 5 FATAL ACCIDENT INQUIRY ACCOMMODATION

- 5.1 The consultation paper notes that 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.

### Ad hoc accommodation for FAIs

- 5.2 The Scottish Court Service has previously held larger, long running FAIs outwith court buildings and the use of ad hoc accommodation may be extended with other suitable locations 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. The major advantage of holding longer and more complex FAIs in dedicated, ad hoc accommodation is that there are fewer competing demands which need to be taken into account. However, 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.
- 5.3 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.

**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?**

- 5.4 The majority of respondents who answered this question agreed 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. Responses are set out in Table 15 below.

**Table 15: Question 16 - Response by Respondent Type**

Respondent Type	Yes	No	Not Answered No View	Total
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	5	4	5	14
Local authorities	6	-	1	7
Public bodies	7	3	5	15
Representative groups	3	2	4	9
<b>Total Organisations</b>	<b>(25)</b>	<b>(9)</b>	<b>(15)</b>	<b>(49)</b>
Individuals	3	2	3	8
<b>TOTAL</b>	<b>28</b>	<b>11</b>	<b>18</b>	<b>57</b>

- 5.5 Thirty seven respondents made a further comment. Further comments suggest that some respondents agreed with both propositions (use of ad hoc

locations and use of sheriff courts in remote locations), some with one or other of the propositions and some with neither.

- 5.6 Many of those who agreed with the proposal pointed to the need to make best use of the range of accommodation available, particularly if delays in holding FAIs can be reduced as a result.
- 5.7 It was also suggested that taking an FAI out of the court setting could help avoid the Inquiry becoming adversarial in nature. However, an alternative view was that holding FAIs in other centres would not necessarily lead to a more relaxed atmosphere and that more effective and pro-active management will be required if a less confrontational atmosphere is to be created. A number of respondents agreed with Lord Cullen's suggestion that other premises may be more suitable to the needs of bereaved families, although a small number of respondents questioned the appropriateness of a less formal setting, including any assumption that members of the public would prefer such an approach.
- 5.8 A small number of respondents commented specifically on the arrangements for rural and remote areas, including questioning how those terms would be applied in practice. It was also suggested that the range of business carried out in courts in remote locations means they are ill-suited to hearing of FAIs of significant duration or that the court buildings in rural and remote areas are often unsuitable for disabled people and children.
- 5.9 Amongst the issues raised by those who disagreed with the proposal was that FAIs would need to be adequately resourced wherever they are held and that those resourcing requirements can be both considerable and specific. For example, the Sheriffs' Association explained that space for sheriffs, legal representatives and witnesses is needed and that there must be access to clerks and bar officers. They also noted that the appropriate security arrangements are essential as is adequate provision of IT, including facilities for the digital recording of evidence and a video link where appropriate. These requirements lead them to conclude that sheriff courts provide the best facilities at no extra cost.
- 5.10 Other concerns about using alternative locations included that bereaved families and witnesses would be inconvenienced by having to travel distances to the FAI venue, including by last-minute changes in the location of an FAI.
- 5.11 Suggestions about venues to be used were that:
  - It would be helpful for inquiries in relation to potential medical mishap to be held in locations accessible to medical experts.
  - Local town halls could be used.

## Fatal Accident Inquiry Centres

- 5.12 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 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.

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

- 5.13 A significant majority of respondents who answered this question disagreed with the establishment of three bespoke, dedicated centres, although a significant minority of respondents, including the majority of Representative Group Respondents, did support the proposal. Responses are set out in Table 16 below.

**Table 16: Question 17 - Response by Respondent Type**

Respondent Type	Yes	No	Not Answered No View	Total
Insurance industry bodies or firms	-	4	-	4
Legal bodies or firms	1	10	3	14
Local authorities	1	5	1	7
Public bodies	2	5	8	15
Representative groups	5	1	3	9
<b>Total Organisations</b>	(9)	(25)	(15)	(49)
Individuals	2	4	2	8
<b>TOTAL</b>	<b>11</b>	<b>29</b>	<b>17</b>	<b>57</b>

- 5.14 Thirty nine respondents made a further comment. The principal objections to the bespoke FAI centres were in relation to the impact on those attending the FAI, and bereaved families in particular. Those raising this concern often pointed to the inconvenience and possible costs incurred, as well as the possibility that people may feel more comfortable in familiar locations which are close to their support networks.
- 5.15 Other respondents questioned whether establishing such centres was necessary (given the option to use ad hoc locations and the number of FAIs held), or whether the costs could be justified, particularly at a time when public sector budgets are under pressure.

5.16 Finally, a small number of respondents pointed to the need to continue to hold FAIs in the formal court setting, suggesting this approach would hopefully compel people to co-operate and tell the truth.

5.17 However, the Scottish Court Service did suggest that:

“...there are clearly organisational advantages to being able to concentrate FAI business. As well as allowing the concentration of judicial and administrative expertise, concentration could help to reduce the impact of the court programme on FAI business allocation - and vice versa.”

5.18 Others agreed and pointed to the particular advantages of concentrating expertise, including through the opportunity for dedicated specialist sheriffs to conduct FAIs. Other comments made by those supporting the development of dedicated centres included that the arrangements would need to support video participation by families and potentially by some witnesses and that preliminary hearings or pre-hearing meetings of expert witnesses should not be held at the centres.

5.19 Finally, and looking to the future, The Scottish Court Service commented that in the longer term their vision is:

“...to develop the concept of the “justice centre” to serve the main population centres of Scotland, providing concentrated specialist and comprehensive facilities within a wider network of smaller courts: such centres in the future could serve as the principal venue for concentrating FAIs.”

**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?**

5.20 Forty respondents made a comment at Question 18, with comments very much reflecting the issues raised at Questions 16 and 17. For example, some respondents noted that the impact on bereaved family members and witnesses will depend on how far they may have to travel to attend an FAI. A number also went on to suggest that any negative impacts (such as needing to pay travel or accommodation costs), must be mitigated. Some respondents also commented that this would, in turn, have an impact on the costs associated with holding FAIs and on the Legal Aid Fund in particular.

5.21 Positive impacts suggested included that:

- Bereaved families, witnesses, services and the wider community would all benefit from any reduction in delays that resulted from using different locations.
- Bereaved families and witnesses would be subject to less stress if the FAI is held outwith the formal court setting. The potential offered by allowing witnesses to provide statements from remote sites was also

raised by Victim Support Scotland suggesting that this procedure takes away some of the formalities and intimidation of giving evidence.

- 5.22 In considering how these proposals should be taken forward, including the impact they would have, the Scottish Court Service recommended that due regard be given to the principles of access to justice outlined in their “Shaping Scotland’s Court Services” consultation.
- 5.23 Finally, it was suggested that taking FAIs out of the formal court setting could have a negative impact if those involved were less inclined to treat the process with the necessary respect.

## **6 SHERIFFS' RECOMMENDATIONS**

- 6.1 As the consultation paper notes, 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. This section of the consultation looked how those recommendations should be disseminated and acted upon.
- 6.2 It also considered the issue of the enforcement of sheriffs' recommendations, very much within the Patricia Ferguson MSP's proposed Inquiries into Deaths (Scotland) Bill, which proposed that recommendations should be legally binding. 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.
- 6.3 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.

### **Disseminating recommendations**

- 6.4 The specific proposal here is for all FAI determinations, subject to redaction, to appear on the Scottish Court Service website and be fully searchable. In proposing this option, the Scottish Government is suggesting a different approach to that recommended by Lord Cullen. The consultation paper explains that Lord Cullen's recommendation was for the Scottish Government webpage to 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 Scottish Court Service website.
- 6.5 The Scottish Government also does not intend to proceed with Lord Cullen's recommendation for an annual report covering the range of matters considered by FAIs in any particular year.

### **Question 19: Should it be mandatory for all FAI determinations, subject to redaction, to appear on the Scottish Court Service website and be fully searchable?**

- 6.6 All but one of the respondents who answered this question agreed that all FAI determinations, subject to redaction, should appear on the Scottish Court Service website and be fully searchable. Responses are set out in Table 17 below.

**Table 17: Question 19 - Response by Respondent Type**

<b>Respondent Type</b>	<b>Yes</b>	<b>No</b>	<b>Not Answered No View</b>	<b>Total</b>
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	12	-	2	14
Local authorities	6	-	1	7
Public bodies	7	1	7	15
Representative groups	7	-	2	9
<b>Total Organisations</b>	<b>(36)</b>	<b>(1)</b>	<b>(12)</b>	<b>(49)</b>
Individuals	6	-	2	8
<b>TOTAL</b>	<b>42</b>	<b>1</b>	<b>14</b>	<b>57</b>

- 6.7 Thirty two respondents made a further comment. The position of many can be summarised as considering the proposal to offer a common sense approach which would help improve transparency and promote learning and which is already common practice. In particular, it was suggested it would make it easier to check if the recommendations from previous FAIs had been carried out and could also improve public safety by alerting people to possible dangers. It was also suggested that the approach helps highlight some of the long delays that can occur between the death and an FAI taking place.
- 6.8 Lord Cullen himself also commented on this proposal, noting that if the Scottish Government remains opposed to the recommendation made in the Review (i.e. that recording and publication should be on the Scottish Government's website), then it should be mandatory for all FAI determinations to appear on the Scottish Court Service website.
- 6.9 A small number of respondents commented on the redaction issue, with the view being that redaction should only be used in rare instances and protect people who may be harmed, or subjected to pressure. For example, the Association of Personal Injury Lawyers was unclear as to why a wide-ranging provision for redaction would be required and suggested:
- “If the FAI was held publicly, there is no reason why there should be provision for the published determinations to be redacted in all cases. This will limit the usefulness of such determinations. We agree, however, that in certain cases, such as those involving children, there should be provision for redaction.”
- 6.10 One Legal Firm Respondent (DAC Beachcroft (Scotland) LLP Solicitors), took a slightly different position in suggesting that there may be some very sensitive cases where even with redaction mandatory online publication may be inappropriate.
- 6.11 Finally, suggestions as to facilities or content the website should offer were that:

- The Scottish Government website should contain a link to the Scottish Court Service website for the information of the public.
- The search facility should allow for searches for all determinations relating to a particular type of death (the name of the parties is currently the only search field).
- The determinations should also include a list of organisations or individuals to whom the sheriff has directed recommendations along with the responses to the sheriffs' recommendations.
- Lord Cullen restated his recommendation for annual reporting on the information to the Scottish and UK parliaments.

**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?**

6.12 The overwhelming majority of those who answered this question thought that sheriffs should instruct the dissemination of their recommendations (if any) to the parties to whom they are addressed and any appropriate regulatory bodies. Responses are set out in Table 18 below.

Respondent Type	Yes	No	Not Answered No View	Total
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	11	2	1	14
Local authorities	5	1	1	7
Public bodies	9	-	6	15
Representative groups	7	-	2	9
<b>Total Organisations</b>	<b>(36)</b>	<b>(3)</b>	<b>(10)</b>	<b>(49)</b>
Individuals	5	-	3	8
<b>TOTAL</b>	<b>41</b>	<b>3</b>	<b>13</b>	<b>57</b>

6.13 Thirty four respondents made a further comment. Many of the comments covered similar issues to those raised at Question 19, namely that the proposal seems consistent with an open and transparent approach and that the potential to learn lessons is maximised. The 'common sense' requirement to ensure that all relevant parties are aware of the findings was highlighted, with Sheriff Crowe commenting that:

"It may be that those criticised have not been parties at the Inquiry and there is no point addressing recommendations to individuals who do not have matters brought to their attention."

6.14 The particular need to employ a structured approach to ensure that the appropriate regulatory bodies are aware of any recommendations made by

the sheriff was also noted, although the Scottish Legal Action Group suggested that it should be within the presiding sheriff's discretion as to whether dissemination is necessary or appropriate.

- 6.15 Issues raised by those who disagreed that sheriffs should instruct the dissemination of their recommendations included that this may risk prejudicing any subsequent criminal trial or that the findings of FAIs are already widely distributed. The Sheriffs' Association reported that the majority of sheriffs do not support this approach reporting that:

“Sheriffs can and do already instruct that copies of their determinations should be brought to the attention of the appropriate professional or government bodies for such action as they deem appropriate... Ensuring that a copy of the sheriff's determination is sent to the correct professional body is not a matter for legislation.”

- 6.16 Practical suggestions made by those who did support the approach set out at Question 20 were that:

- Where recommendations have been made as a result of a workplace fatality, there should be some mechanism whereby the Crown or HSE checks whether there has been compliance with the recommendations.
- If any of the parties found to have caused an accident is regulated by a professional body (such as the General Medical Council), that professional body should be alerted to the findings.

**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?**

- 6.17 A clear majority of respondents who answered this question agreed that parties to whom sheriffs' recommendations are addressed should be obliged to respond to the sheriff indicating what action had been taken. However, a significant minority, including the majority of Legal Bodies or Firms respondents, disagreed. Responses are set out in Table 19 below.

**Table 19: Question 21 - Response by Respondent Type**

<b>Respondent Type</b>	<b>Yes</b>	<b>No</b>	<b>Not Answered No View</b>	<b>Total</b>
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	5	8	1	14
Local authorities	4	1	2	7
Public bodies	6	2	7	15
Representative groups	5	2	2	9
Total Organisation	(24)	(13)	(12)	(49)
Individuals	5	2	1	8
<b>TOTAL</b>	<b>29</b>	<b>15</b>	<b>13</b>	<b>57</b>

- 6.18 Forty one respondents made a further comment. As at the earlier questions in this section, some respondents suggested this approach would help support an open and transparent process and would also introduce an element of public accountability. A number of respondents pointed to it being in the public interest to have a clear record of the recommendations made and any actions taken in response, with the Society of Solicitor Advocates of the view that:

“If an inquiry has been held in public and, on the evidence and having heard interested parties, the court has reached certain conclusions and made recommendations, it ought at the very least to be a matter of record whether or not the recommendations are to be followed, and, if not, why not.”

- 6.19 Others noted that there may be reasons why the sheriff's recommendations do not need to be acted upon or are not realistic or practical but that there should be a public record to allow for an element of 'follow-up' and in particular allow interested parties to find out why recommendations have not been acted on. It was also suggested that parties may be more likely to take action if they would otherwise be expected to explain why they had not. Specific suggestions as to how these proposals should be implemented included that anyone to whom a recommendation is directed, should be consulted by the sheriff ahead of its release. In his consultation response, Lord Cullen suggested that he would agree to the proposal on the basis that the sheriff would transmit the responses to the Scottish Court Service for inclusion in its website.

- 6.20 Similarly, the STUC did not wholly agree with the Scottish Government's proposed approach and, along with some of the respondents who disagreed with the proposal, called for sheriffs to be given the power to ensure that their recommendations are implemented. Unite was of the view that:

“...without additional powers to legally enforce recommendations pertaining from the Sheriff's determination, the FAI is a constrained instrument. It can diagnose the problems which contributed to the fatality but cannot legally implement the necessary change to prevent reoccurrence.”

- 6.21 Other issues raised by those wishing the Scottish Government to take a 'stronger' position on enforcement of recommendations included that the Government should make strong representations to the UK Government where a public body's functions relate to reserved legislation and action or legislative change is required to implement a recommendation coming out of an FAI. It was also suggested that the Scottish Government could disqualify those who do not respond to sheriff's recommendations from being awarded public sector contracts.
- 6.22 Whilst some respondents, and particularly Union respondents, called for sheriffs to have greater powers, a group of other largely Legal Body or Firm Respondents took a very different view. Although there was variation in position, the general stance was that once the FAI has been completed the role of the sheriff should also conclude and that, in particular, it would not be appropriate for any response to or reporting on recommendations to be directed to the sheriff. The Law Society of Scotland, the Scottish Court Service, the Sheriffs' Association and the Sheriffs Principal were amongst the respondents taking this view. The Sheriffs Principal noted that this was an issue of both principle and practicality. On the point of principle they commented that:

"...the role of the sheriff in an FAI is essentially a judicial one, namely to make a determination setting out the circumstances of the death so far as established to his satisfaction on the basis of the evidence adduced before him, the primary responsibility for which lies with the procurator fiscal."

- 6.23 From the practical perspective they were amongst those suggesting that, even if it were appropriate, the resources are simply not available to allow sheriffs to undertake this role and that, in line with Lord Cullen's recommendations, responsibility should fall to the Scottish Government. The Scottish Legal Action Group suggested that the Government could establish a small department whose duty it was to monitor these issues. Given the number of FAIs which are held, and that not all result in recommendations being made, it was suggested that the volume of work would not be onerous.

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

- 6.24 Thirty one respondents commented on the impact the proposals might have on themselves as individuals, their organisation or their community. A number of respondents were of the view that the proposals would have minimal or no impact on themselves or the area in which they worked. Those taking this view ranged across the respondent types and included 4 Insurance Industry respondents and well as a small number of Public Bodies, Local Authorities, and Legal Bodies or Firms.
- 6.25 Where possible impact was identified, respondents generally pointed to serving the public interest by helping prevent repeat accidents and future

deaths and that bereaved relatives may find some comfort if lessons are learned from the death of their loved one.

- 6.26 Finally, one Legal Firm Respondent (DAC Beachcroft (Scotland) LLP Solicitors) suggested that if a sheriff makes a recommendation that is specifically “disseminated” to a party any criminal prosecution could be prejudiced by the party being forced to give responses which might subsequently be used in evidence against them at a criminal trial.

## 7 LEGAL AID FOR BEREAVED RELATIVES

- 7.1 The consultation paper notes that families involved in FAIs may require their own legal representative and that 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, and is available on the same basis as for civil proceedings. An application for legal aid is approved by the Scottish Legal Aid Board based on probable cause, reasonableness and financial eligibility. In terms of the ‘reasonableness’ test, applications “should focus on why the applicant needs separate legal representation at the FAI” (Civil Legal Assistance Handbook, Chapter 13.88.).
- 7.2 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 Scottish Ministers should consider increasing the limit for legal aid in FAIs and the extent to which legal aid is available within that limit. However, the Scottish Government does not agree with this recommendation and believes that existing statutory tests should continue to apply.

**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?**

- 7.3 The majority of respondents who answered this question agreed that the existing arrangements for legal aid for bereaved relatives at FAIs should remain. However, a number of respondents disagreed, including the majority of the Legal Bodies or Firms who answered Question 23. Responses are set out in Table 20 below.

**Table 20: Question 23 - Response by Respondent Type**

Respondent Type	Yes	No	Not Answered No View	Total
Insurance industry bodies or firms	4	-	-	4
Legal bodies or firms	4	6	4	14
Local authorities	4	-	3	7
Public bodies	7	-	8	15
Representative groups	3	3	3	9
<b>Total Organisations</b>	<b>(22)</b>	<b>(9)</b>	<b>(18)</b>	<b>(49)</b>
Individuals	1	4	3	8
<b>TOTAL</b>	<b>23</b>	<b>13</b>	<b>21</b>	<b>57</b>

- 7.4 Twenty five respondents went on to make a comment at either or both of Questions 23 and 23a, with some respondents referring between their comments at the two questions. The analysis presented here summarises the views expressed at both questions.
- 7.5 A number of respondents made a broad statement of support for the continued provision of legal aid to bereaved families, and that it is important to ensure access to judicial proceedings for those who have a legitimate need to be represented but also that it is important to remain focused on FAIs being fact-finding rather than fault-finding exercises. In particular, the Sheriffs' Association commented on the need to guard against FAIs to be treated as 'dry runs' for any civil proceedings and that:
- "COPFS have a public duty to present evidence concerning the circumstances of the accident or death. It is only where there is a conflict of interest between the procurator fiscal and the next of kin that there should be a necessity for separate representation."
- 7.6 The Scottish Legal Aid Board's view was that the existing guidance and approach remain appropriate. Commenting specifically on the assessment of reasonableness they noted that the decision as to whether make public funding available for representation - whether for a relative of the deceased or a potential defender - focuses on why someone requires separate representation at the FAI.
- 7.7 However, other respondents took the view that, in line with Lord Cullen's recommendation, there is or may be a case for different or less stringent rules being applied and/or for legal aid limits being increased. Specific issues raised and suggestions made included:
- If bereaved families are denied legal aid and go on to represent themselves they may struggle with the process and FAIs may be prolonged.
  - If there is any potential conflict of interest, such as an involvement of any agency of the State in the circumstances of the death, the reasonableness test should be regarded as satisfied. On this issue, the Scottish Legal Aid Board reported that if a legal aid applicant is a relative of a person who died in custody they consider it reasonable for relatives to have their own independent representation to determine the facts.
  - The arrangements should be modelled on the Inquiries Act 2005, by which the chair of a public inquiry receives funding applications from those wishing to be represented. For an FAI, if there is a concern that counsel to the inquiry would be unable to represent a participant, the power to award public funding would lie with the sheriff, who would only award funding where he or she believed necessary, and with those decisions binding on the Scottish Legal Aid Board.

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

- 7.8 Eighteen respondents commented on the impact the legal aid proposals might have on themselves as individuals, their organisation or their community, although comments tended to be brief. A number of respondents were of the view that the proposals would have minimal or no impact on themselves or the area in which they worked. Those taking this view ranged across respondent types.
- 7.9 A small number of respondents suggested that, if the current arrangements are retained, the impact will be to disadvantage bereaved families, particularly if other parties are well represented.
- 7.10 The Scottish Legal Aid Board noted that any change to allow civil legal aid to be made available without an assessment of the reasonableness test or financial eligibility issues would impact on the civil legal aid budget, with the scale of that impact depending on the number and scale of the FAIs held over the course of each financial year.

**Equality Impact Assessment**

- 7.11 The final section of the consultation response form asked respondents for any further comments on any potential impacts, either positive or negative, they felt any or all of the proposals may have on a particular group or groups of people.
- 7.12 Seventeen respondents made a comment, with a number simply stating that they did not anticipate the proposals would have any positive or negative impact on the protected characteristics groups<sup>5</sup>.
- 7.13 The Scottish Prison Service raised a number of issues, including an inconsistent approach in FAI hearings for women and men who have died in prison. They noted that most FAI hearings for men take on average 2-3 days but for women over 5 days, and that an upcoming FAI for a female in custody has been scheduled over a 2 week period.
- 7.14 Other issues raised by respondents were that:
- Care will need to be taken to ensure that vulnerable families and those with poor English language skills have their voices heard.
  - In particular, the needs of bereaved families of Scots who die abroad and of those killed by road users in the course of their employment should be given greater consideration.
  - In selecting accommodation for FAIs, consideration should be given to the ethnic and religious beliefs of the community and to ensuring that the premises are fully accessible.

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<sup>5</sup> The protected characteristics that must be profiled against the policies are: Age; Sex; Pregnancy and maternity; Disability; Race; Religion or belief; Gender Reassignment and Sexual Orientation.

## **ANNEX: GROUP RESPONDENTS**

Action against Medical Accidents  
Argyll and Bute Council  
Association of Personal Injury Lawyers  
Aviva Insurance Ltd  
BLM LLP  
Care Inspectorate  
DAC Beachcroft (Scotland) LLP Solicitors  
Death Abroad - You're Not Alone (DAYNA)  
East Lothian Council  
Equality and Human Rights Commission (EHRC)  
Faculty of Advocates  
Forum of Insurance Lawyers (Scotland)  
Forum of Scottish Claims Managers  
Glasgow City Community Health Partnership  
Glasgow City Council  
Health and Safety Executive (HSE)  
Law Society of Scotland  
(The) Medical and Dental Defence Union of Scotland (MDDUS)  
Mental Welfare Commission for Scotland  
Morton Fraser LLP  
National Union of Rail, Maritime and Transport Workers (RMT)  
Network Rail Infrastructure Ltd  
NHS Grampian  
NFU Mutual Insurance Society Ltd  
NHS National Services Scotland  
North Lanarkshire Council  
Peacock Johnston, Solicitors  
Perth and Kinross Council  
PinSENT Masons LLP  
Police Investigations and Review Commissioner  
Royal College of Psychiatrists  
Scotland's Campaign against Irresponsible Drivers (SCID)  
Scottish Ambulance Service  
Scottish Civil Justice Council  
Scottish Court Service (SCS)  
Scottish Human Rights Commission (SHRC)  
Scottish Legal Action Group (SCOLAG)  
Scottish Legal Aid Board (SLAB)  
Scottish Public Services Ombudsman (SPSO)  
Scottish Prison Service  
Scottish Trades Union Congress (STUC)  
(The) Sheriffs' Association  
Sheriffs Principal

Society of Solicitor Advocates  
South Lanarkshire Council  
Unite  
Victim Support Scotland  
West Lothian Council  
Zurich Insurance PLC

Social Research series  
ISSN 2045-6964  
ISBN 978-1-78412-934-7

web only publication  
[www.scotland.gov.uk/socialresearch](http://www.scotland.gov.uk/socialresearch)

APS Group Scotland  
PPDAS39052 (11/14)

