

**IER SUBMISSION**

**Inquiries into Deaths  
(Scotland) Bill  
An IER submission  
By  
Dr David Whyte**



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**Q1: Do you support the general aims of the proposed Bill as outlined above? Please indicate yes / no / undecided and outline your reasons for your response.**

Yes. The general aims of the proposed Bill go far to address the recommendations of Lord Cullen's 2009 Review of Fatal Accident Inquiry Legislation which seeks to enhance the openness of the process, and enhance the impact of judicial recommendations following FAI. The aim to give the family a more central role in the process, and to expand the scope of FAIs to include all work-related deaths makes sense, and is consistent with other developments in policy, as we will outline below.

**Q2: Do you agree that equal emphasis should be placed on a) identifying how the death occurred and b) ensuring lessons are learned following the death? Do you accordingly agree that there will be occasions where an inquiry should be held to only consider what lessons are learned from a death because the circumstances of the death are well established? Please indicate yes / no/ undecided and explain the reasons for your response.**

Yes. This is self-evident. There is absolutely no point in spending a great deal of time and expense inquiring into the circumstances of a death if little is done to prevent the death happening again. Of course this is not the only function that is performed by Fatal Accident Inquiries, yet it is one that has always been central and has not been particularly well served, as Lord Cullen's review pointed out, by the lack of publicity afforded to the lessons learned by FAIs and the criteria set out requiring a particular course of action to be followed by a particular entity or body.

**Q3: Do you agree that it is important that the Sheriff be given the fullest power to make and enforce recommendations for change in light of the lessons learned from the death, including the creation of the statutory offence proposed in the Bill and do you think that the proposals within the Bill satisfy that purpose? Please fully explain the reasons for you answer.**

Yes, again this is fully consistent with Lord Cullen's recommendations in Review of Fatal Accident Inquiry Legislation (pp 73-75). There are, however, some crucial aspects of Lord Cullen's recommendations that do not appear to be included in the Bill. I refer to those pertaining to the dissemination of the recommendations made by Sheriffs. Lord Cullen recommended that there should be space on the Scottish Government's website dedicated to publishing the recommendations and noting the entity or body responsible for their implementation (at para 8.24, page 73). This record would also show the date and details of the response. In addition, Lord Cullen recommended that an

annual report of the recommendations of FAIs, and details of the responses to them should be published by the Scottish Government and laid before both the Scottish Parliament and the UK Parliament (also at para 8.24, page 73). It is clear that adding this provision to the Bill would make sense in terms of boosting the transparency and accountability of the FAI process, and making the benefits of the system clear to the public and to bereaved families.

**Q4: Do you agree that strict, and short, time limits require to be introduced into the system both in relation to the time frame within which the Lord Advocate must make a decision about whether a judicial inquiry shall be held and thereafter the timeframe for holding certain procedural hearings and the hearing of evidence itself? Please indicate yes / no / undecided and explain the reasons for your response**

**Q5: Do you think that the timeframes and the means of judicial management proposed within the draft Bill are sufficient and the best way to achieve a speedy and efficient means of driving the inquiry process forward? Please indicate yes / no / undecided and explain the reasons for your response**

Yes. It is clear that bereaved families are not served well by the common delays that the system is currently beset by.

**Q6: Do you agree that the Lord Advocate should produce clear written decisions when certain powers are exercised in relation to inquiries into deaths as proposed in the draft Bill? Please indicate yes / no / undecided and explain the reason for your response?**

Yes. Please see our response to Q3 above. It will also be important to a) effectively communicate those decisions to the public and b) report to the Scottish and UK Parliament on those decisions. It makes sense that the same *fora* for dissemination of recommendations made by FAI are used to disseminate details of decisions made by the Lord Advocate in relation to FAIs.

**Q7: In what circumstances do you think an inquiry should be carried out following an accident or incident leading to a work related death? Please fully explain the reasons for you answer.**

The Bill addresses a major anomaly in practice. At the moment, for the purposes of criminal liability, workplace health and safety law does not distinguish between deaths caused by sudden injury and those caused by occupational ill health, or by exposures to harmful substances. Indeed, the Health and Safety Executive and local authority regulators have a remit which

covers both deaths caused by sudden injury and occupational health caused deaths. It is clear that this anomaly has developed as a matter of practice in Fatal Accident Inquiries, and that there is no logical practical or legal reason for this anomaly.

**Q8: Do you agree that an inquiry into a workplace death should be heard by either a specialist personal injury Sheriff or the specialist personal injury Sheriff Court with jurisdiction to hear cases throughout all of Scotland as currently being proposed in the Courts Reform (Scotland) Bill Consultation 2013? Please indicate yes / no / undecided and explain the reasons for your response.**

Clearly there is a chronological convenience in terms of the Bill dovetailing with other ongoing proposals. However, it seems that there are both advantages and disadvantages associated with using the personal injury procedures set out in the Courts Reform (Scotland) Bill Consultation 2013. The key advantage is that the Sheriff and the court would have experience in dealing with cases involving personal injury, and this is of course highly relevant. The key disadvantage is that this court will be specialising in civil law, and the scope of the FAI will reach into much broader fields of law, namely criminal and regulatory law.

**Q9: Do you agree that the family of the deceased ought to have a special role within the inquiry process guaranteed by the rules governing inquiries into deaths and do you think that the proposed Bill, annexed to this consultation, is sufficient for that purpose? Please indicate yes / no / undecided and explain the reasons for your response.**

**Q10: In particular, do you agree that the family of the deceased should be entitled to determine that an inquiry takes place in the proposed specialist Sheriff Court unless the Lord Advocate is able to show special cause to the contrary; and should have the right the inquiry into the death of their family member by the means proposed in the draft Bill? Please indicate yes / no / undecided and explain the reasons for your response.**

The extension of particular rights to bereaved families is consistent with recent policy on enhancing the role of victims in the justice system. Those proposed provisions are, for example, consistent with the aims of the Victims and Witnesses (Scotland) Act, namely to: set clear standards of service for victims; give victims a right to certain information about their case; and enhance the role of victims within the justice system. A major aim of the FAI system must be to enhance the possibility for the bereaved to find out the full circumstances that

led to the deaths of their loved ones. In so far as those provisions enhance those aims, they should be welcomed.

We would like to propose one amendment to the ‘notification to certain persons’ clause in the Bill. Section 6 of the Bill provides for the employee to be notified of the intention to hold an inquiry. It makes sense that since this Bill aims to extend the role of FAIs in work related deaths, that, in addition to employers, an individual’s trade union should also be notified of the decision to hold an FAI, as well as any trade unions that have members in that particular workplace. Of course this may not always apply, given that a worker killed in the course of their work may not be a trade union member, and the death may take place in a workplace that has no trade union presence. However, the central role that trade unions play in ensuring the health and safety of workplaces, and the key role they very often play in ensuring that the causes of work related deaths are remedied, placed those organisations in a role that is often every bit as important as the employer in the aftermath of a fatality. Moreover, workplace health and safety in the UK is still governed by a tripartite system in which employers’ organisations, government and employees’ organisations are expected to share a leading role. Including relevant trade unions with a presence in a particular workplace in Section 6, part (4) (d) would be consistent with the principle of tripartism that is the basis for UK health and safety law.

**Q11: Do you have any experience of the current FAI system either positive or negative which you think is relevant to this consultation? Please answer as fully as possible.**

n/a

**Q12: What, if any, are the wider implications of the proposed Bill? Can you see any unforeseen consequences? Do you estimate that the proposed legislation will have financial implications for you or your organisation? Please indicate yes / no / undecided and explain the reasons for your response.**

It is clear that there will be costs associated with a more comprehensive process that provides an enhanced role for bereaved families and at the same time provides an enhanced basis for learning the lessons and acting upon the recommendations. It is currently in vogue for politicians south of the border to invoke ‘red tape’ as a warning against any improvement in regulation. I expect that such warnings will be made by some stakeholders in this process, particularly those representing business. Any such crude invocation of ‘red tape’ warnings cannot be disregarded out of hand. This Bill will certainly

extend responsibilities upon some organisations and individuals who are involved in activities that may cause fatalities. At the same, the acceding to this logic can place a heavy cost upon our system of justice. The minor inconvenience that some businesses may face are likely to be of small significance in comparison to the improvement to the effectiveness and the transparency of the system of Fatal Accidents Inquiries. In sum, the long-term benefits to the justice system dwarf the short-term burdens that may fall on some individuals and organisations.