RESPONSE

*by*

THE FACULTY OF ADVOCATES

*to*

*the Call for Evidence on the*

INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC. (SCOTLAND) BILL

The Faculty of Advocates is Scotland’s independent referral bar. The Lord President has described the essential qualities of the Faculty in the following terms: “a commitment to excellence, a commitment to scholarship and learning, a commitment to the noblest ideals of professional conduct and, above all, a commitment to justice for all in our society”. The bar has great collective experience of conducting all types of hearings, including fatal accident inquiries.

As set out in paragraph 3 of the explanatory notes, the Bill seeks to modernise the legislative framework for Fatal Accident Inquiries (FAIs) in Scotland. The Faculty supports that aim. It is clear that the provisions of the Bill take forward many of the recommendations requiring primary

legislation from Lord Cullen’s Review of the operation of the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 (“the 1976 Act”) which reported in 2009. Again, in the main, the Faculty favours those recommendations being taken forward and supports the Bill’s aim of making the process of investigating deaths quicker and more transparent.

**Inquiries into certain deaths (ss. 1-7)**

The Faculty supports these sections, subject to only one qualification. The Faculty considers that a mandatory inquiry should be held into the death of a child maintained in a residential establishment for the purposes of the Children (Scotland) Act 1995 or the Social Work (Scotland) Act 1968. The Faculty favours the inclusion of a death of a child required to be kept or detained in secure accommodation as an addition to the mandatory categories in the 1976 Act. However, the Faculty adheres to the view it has previously expressed that Lord Cullen’s recommendations on this issue ought to be implemented in full by including within the mandatory categories deaths of children being maintained in residential establishments. In its July 2014 consultation paper the Scottish Government drew a distinction in this context between children maintained in residential accommodation which is not secure accommodation and those in secure accommodation, namely that residential establishments cannot detain children against their will. We do not consider that distinction is sufficiently persuasive to justify departing from Lord Cullen’s recommendation. A child who is in a residential establishment provided or arranged for by the State is in the care of the State; if they are there under a supervision order made under the Children’s Hearings (Scotland) Act 2011, then they are subject to the coercive power of the State, even if they are not held in secure accommodation. Lord Cullen considered that the dividing line between cases where an FAI should be mandatory in relation to a child in care should exclude children in kinship or foster care, but include children in residential establishments. We share his view that this is the appropriate division.

**Reasons where inquiry not held**

The Faculty supports the requirement for reasons to be given on request for a decision not to hold an inquiry.

**Procurator fiscal’s investigation**

The Faculty recognises that it is important for the fiscal to have the power to cite witnesses, if necessary, for precognition as part of a death investigation.

**Participants**

The Faculty notes that the provisions in this section have been updated to capture modern relationships as the 1976 Act does not include civil or cohabiting partners: the Faculty supports this.

**Location**

The Faculty agrees that the Scottish Ministers should be able to make regulations, as provided by section 11, to designate places at which a sheriff court may be held for the purposes of holding an FAI.

Section 12(1) is an important new provision which provides that an FAI may be held in any sheriffdom in Scotland regardless of the place of the death or (if applicable) any accident causing death. The Faculty understands that the thinking behind this is to allow greater flexibility in the system of FAIs which may allow inquiries to be held more quickly. The Faculty supports this provision in the interests of avoiding delay in FAIs where possible but on the basis that the flexibility permitted by section 12 would still permit an FAI to be heard locally.

The Faculty notes that the expectation expressed in the explanatory notes to the Bill is that most inquiries will continue to be held in the sheriffdom connected with the death, and it may be that there should be a statement on the face of the Bill that an inquiry will take place in that sheriffdom unless there is a good reason for it to be held elsewhere. One reason for holding the inquiry in the sheriffdom local to the death is that this will usually (though not always) be the forum which is convenient for the family of the deceased, witnesses and other interested parties. The Faculty suggests that the views or interests of the family of the deceased should be taken into account when decisions are made about forum.

**Inquiries into multiple deaths**

The Faculty agrees that in certain circumstances it may be appropriate to hold a single FAI into multiple deaths even if they have not occurred in the same sheriffdom.

**Pre-inquiry procedure**

The Faculty supports the focus on the desirability of holding the FAI as soon as is reasonably practicable, the provisions in relation to preliminary hearings and the agreement of uncontroversial evidence with a view to shortening the length of FAIs. It is suggested that section 17 should be amended, to provide that the act of sederunt mentioned will “prescribe the appropriate procedure for the agreement by …”. The word “about” could be read to suggest that the act of sederunt could go beyond procedural mechanisms.

**The inquiry**

The Faculty has no comment.

**Findings and recommendations**

The Faculty agrees with the approach which has been taken in the Bill to the sheriff’s findings and recommendations. The proposals strike an appropriate balance in relation to the effect of findings and recommendations.

**Further inquiry proceedings**

The Faculty notes that section 28 confers a new power on the Lord Advocate in connection with circumstances in which there may be further proceedings. The Faculty can see merit in such a provision in the public interest

**Inquiry procedure rules**

No comment

**Specialist sheriffs and summary sheriffs**

The Faculty considers that there is merit in the power to designate “specialist” sheriffs in FAIs. The Faculty has some concern about the use of summary sheriffs in FAIs. While this would allow for flexibility – and may assist in the aim of securing that inquiries will be held as quickly as possible, the use of summary sheriffs would appear to run counter to the proposal for “specialist” sheriffs. Given the limited jurisdiction of summary sheriffs, there may be a perception that an inquiry before a summary sheriff is being treated with less significance than an inquiry before a non-summary sheriff.