Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill
Written Evidence/Comments submitted by the Sheriffs Association

In addition to the undernoted comments, reference is made to our response to the consultation document which preceded this Bill which was submitted on 9 September 2014 (a further copy of which will be supplied on request)

1. Places at which inquiries may be held – section 11/ Jurisdiction – section 12

Jurisdiction to hold an FAI is currently conferred on the procurator fiscal within whose district and the sheriff within whose sheriffdom, the circumstances of the death seem most closely related. (It will have been apparent from our response to the consultation paper that we consider that this should continue to be the case). The consultation paper posed questions in relation to the viability of setting up specialist FAI centres. We presume that section 11(1) of the Bill envisages inquiries taking place in such centres. Section 12(1) provides that proceedings may be held in a sheriffdom "whether or not there is a connection between the death, or any accident resulting in the death, to which the inquiry relates and the sheriffdom". We are concerned about these provisions which may lead to the centralisation of FAIs and a move towards the use of specialist centres or particular designated specialist courts. In our view it is important to maintain a link between the inquiry and the local community where the death occurred. Further, the centralisation of cases will have a significant impact in relation to the cost of travel and accommodation for witnesses, relatives of the deceased and legal representatives.

While the vast majority of FAIs should be dealt with in the relevant sheriff court, we accept that the use of alternative accommodation may be appropriate in larger, more complex and long-running inquiries. It is important that the location identified is not only viable for witnesses and relatives but also that it is appropriately resourced in terms of security, clerking arrangements and information technology.

Section 12(2) of the Bill envisages that the Lord Advocate, after consulting the "Scottish Courts and Tribunal Service" will choose the sheriffdom in which proceedings are to be

held. If it is the view of the executive that FAIs should, for example, be centralised in Edinburgh or Glasgow, there may be significant pressure upon the Crown to make applications to hold inquiries in only those locations. Section 12(3) attempts to introduce a safeguard in providing that the presiding sheriff "may make an order transferring the proceedings to a sheriff of another sheriffdom". However in practice this can only be done with the consent of both sheriff principals involved. It is unclear how the sheriff concerned ought to make enquiries of the sheriff principals in such circumstances. In practical terms it is difficult to envisage how this procedure would operate to enable a sheriff to make an order *ex proprio motu* to transfer an FAI having first secured the consent of two relevant sheriff principals.

If the terms of section 12(1) are to remain notwithstanding our previous observations, then in our view applications for transfer of an inquiry should be made to the sheriff and the Bill should provide a framework for the exercise of discretion to transfer FAIs with reference to factors such as the impact on the families of the deceased, witnesses etc. It also seems surprising to us that section 12(2) does not provide for the Lord Advocate to consult with sheriff principals as regards the initial choice of sheriffdom before an application to hold an inquiry is made, given the sheriff principals' statutory responsibility for the management of business in their sheriffdom.

2. Initiating the Inquiry – Section 14/ Preliminary Hearings – Section 15

Section 14 of the Bill provides that a procurator fiscal must give the sheriff along with a notice that the inquiry is to be held "a brief account of the circumstances of the death so far as known to the procurator fiscal and any other information required by an Act of Sederunt (yet to be promulgated) under section 34(1)". Based on that information the sheriff must make an order fixing a date and place for a preliminary hearing and a date for the start of the inquiry which should be "as soon as reasonably practicable". In our view an application to hold an FAI should incorporate a proper narrative setting out the facts and circumstances of the case, and in particular where the application is a discretionary one, what the public interest issues are. Sheriffs have encountered difficulties with the narrow specification given under the existing rules and suggest that

this issue could helpfully be addressed in section 14 and the Act of Sederunt which is to follow.

We appreciate that section 14 is qualified in terms of section 3(b) to provide that where the sheriff considers that it is "not appropriate" a date for the inquiry may not be fixed and further that the Act of Sederunt referred to under section 34(1) which will presumably provide significant detail in terms of procedural rules etc. will follow. It would be helpful to have a set of rules in relation to the content and format of such applications and also details of potential interested parties including relatives, employers etc. (We assume that we will be given the opportunity to comment on the draft Act of Sederunt in due course.)

Applications to hold an FAI should not ordinarily **be** granted unless or until the procurator fiscal's investigations have been completed or are at an advanced stage of preparation. Effective judicial management of FAIs is crucial to the efficient progress and early focussing of cases. Preliminary hearings play an important part in that process. At the preliminary hearing sheriffs should be able to ascertain from the parties the likely length of the inquiry, the state of preparation of the parties or their representatives, the issues likely to arise, the nature of the evidence and availability of the witnesses, scope for agreement of aspects of evidence, the exchange of expert reports, arrangements for cross examination of experts, **and** the nature and arrangements for productions etc. Often preliminary hearings call at a stage where parties are not fully prepared and where many outstanding matters require to be addressed. There are material issues such the grant of legal aid for representation and related applications before SLAB in relation to sanction for experts. Solicitors may only fully investigate when legal aid is granted and expert reports undertaken. Late disclosure leads to adjournments and consequently early proactive management by the court is essential. This emphasises the need for careful consideration of the timing of the preliminary hearing, new rules and procedures to enable the sheriff to undertake a meaningful management role throughout the proceedings and judicial continuity in dealing with cases.

We find it difficult to envisage any cases where it will be appropriate for the sheriff to fix a start date for the inquiry as soon as an application is lodged. Assigning a date

before the Crown's investigations are complete leads to problems. It is impractical to fix a date when the scope and complexity of the hearing, the number of witnesses and potential for agreement of evidence or use of affidavit evidence and the proposed input from experts has yet to be been identified and in consequence an informed estimate as to the likely length of the inquiry and the court time and accommodation required made.

3. Agreement of Facts before an Inquiry – Section 17

FAIs are independent public inquiries. Sheriffs may request further evidence on issues arising where appropriate. In this context concern has been expressed by some sheriffs about the court being bound by the terms of an agreement between the parties as to the scope of the inquiry which is a matter for the sheriff. The wording of section 17 of the Bill is not entirely clear and we may have misunderstood the policy intention.

4. Judicial Specialism in Inquiries/ Competence of Summary Sheriffs to conduct inquiries – Sections 35 and 36

We are very concerned about these sections of the Bill. It seems to be envisaged that sheriff principals will no longer conduct inquiries. FAIs involve the consideration of matters of significant public interest and importance which attract a significant media profile. The inquiries into the Glasgow refuse lorry accident and the Clutha helicopter crash are two examples of such inquiries which are likely to arise in the coming year. The public have a reasonable expectation that such cases will be dealt with by the most senior judicial office holder in the sheriffdom concerned.

There is an emphasis on sheriff principals designating one or more sheriffs as specialists in fatal accident inquiries. This was not a specialism envisaged in the Courts Reform (Scotland) Act 2014. The designation of specialist sheriffs is likely to lead to the centralisation of FAIs and the grouping of specialist sheriffs in only a small number of courts or specialist FAI centres. We would strongly oppose such a move.

We are also very concerned to note the proposal to extend the competence of summary sheriffs in relation to FAIs. FAIs were not envisaged as an area of work to be undertaken

by summary sheriffs in the 2014 Act. Given the complexity of such cases and the importance of the subject matter we are of the view that they should remain within the privative jurisdiction of sheriffs.

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