



Law Society
of Scotland

Consultation Response

Proposed Victims, Criminal Justice and Fatal Inquiries (Scotland) Bill

June 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law committee welcomes the opportunity to consider and respond to the consultation on the Proposed Victims, Criminal Justice and Fatal Inquiries (Scotland) Bill. The committee has the following comments to put forward for consideration.

General comments

We welcome this consultation on the draft proposal for legislation which, in principle, explores whether current arrangements for victims of crime are working effectively and whether changes to the current legal framework on fatal accident inquiries should be amended. The consultation offers an opportunity to consider whether there are gaps in current provision.

The exploration of the abolition of the not proven verdict is, as we know, the subject of a separate Scottish Government consultation.

We recognise that valid points are made in particular around the limits to the victims right to seek and be provided with information and the reasons for decisions.

Consultation questions

Question 1 - Which of the following best expresses your view of the proposed Bill?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

On balance, we express a **neutral** view of the proposed bill. This is in no way intended to trivialise the pain and suffering felt by victims of crime and their families when decisions are made without their knowledge and often without an explanation of the reasons for the decision. We note that in some cases there is already legislation which addresses the concerns set out in the proposed bill, or there are measures but these have yet to be brought into force. In others, the aim of the consultation appears to be to require the Parole Board or prison governors to take certain action rather than to permit them to do so.

Question 2 - Do you think legislation is required, or are there other ways in which any of the Bill's aims could be achieved more effectively?

Please explain the reasons for your response.

As stated at question 1 above, we are of the view that in most cases either existing legislation would require to be brought into force, such as that set out in section 5 of the Management of Offenders (Scotland) Act 2019¹, or new measures would be required to achieve the Bill's aims.

It would not be needed to achieve the aim of Q10 on notification of a decision not to prosecute as the provisions as set out in S.6 of the Victims and Witnesses (Scotland) Act 2014 provide victims with a statutory right to request information from COPFS in relation to their case. The information that a victim may request, and COPFS must provide, includes any decision not to institute criminal proceedings and the reasons for the decision.

Question 3 - Which of the following best expresses your view of the proposed removal of the "Not Proven" verdict in Scots Law?

- Fully supportive
- Partially supportive

¹ [Management of Offenders \(Scotland\) Act 2019 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure
- No comment on this policy proposal – skip to next question

Please explain the reasons for your response.

Fully Opposed – Our views in relation to the not proven verdict are set out in our response to the Scottish Government consultation response submitted in March 2022².

Question 4 - Which of the following best expresses your view of the proposal that victims (or their families in cases where the victim is deceased) are allowed to make representations in person when parole board hearings and temporary release applications are considered?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure
- No comment on this policy proposal – skip to next question

Please explain the reasons for your response. Please include any comments on the specific issues underlined in the consultation document on this proposal.

Neutral - The consultation indicates that victims have expressed the desire to have more involvement in the parole process. We consider it important that all parties involved in the Scottish criminal justice system understand the process and we have previously advocated for more proactive approaches as regards education and awareness³. We feel that this approach would go some way toward addressing many of the concerns shared by victims and their families which at times stem from a lack of understanding of the process. We have previously queried whether victims and/or their families would be entitled to legal advice and assistance and note that the consultation is silent on this issue.

We have previously welcomed the prospect of changes to improve the parole system to benefit victims, their families, and prisoners⁴. We note that the Parole Board (Scotland) Amendment Rules 2021 allows for victims and at least one nominated supporter to observe hearings either in person or virtually⁵.

² [22-03-11-crim-final-npv-response.pdf \(lawscot.org.uk\)](#)

³ [crim-transforming-parole-in-scotland-27-03-2019.pdf \(lawscot.org.uk\)](#)

⁴ [crim-transforming-parole-in-scotland-27-03-2019.pdf \(lawscot.org.uk\)](#)

⁵ [The Parole Board \(Scotland\) Amendment Rules 2021 \(legislation.gov.uk\)](#)

Particular care would need to be taken to avoid giving the victim (or their family) the impression they have an influential role in the *decision-making* process. Overall, we recognise that the process should respect the rights of the victim and the rights of the prisoner.

“In person” representations could have the potential to retraumatise victims of crime. On that basis, we would query whether written submissions may be more appropriate and note that provision is already made for this within the Criminal Justice (Scotland) Act 2003 as amended⁶.

We observe that the proposals do not set out any definition of the term “family.” We consider that setting out a definition and/or clear familial parameters would be of benefit in the proposed bill. We would suggest that the statutory framework as set out in section 14 of the Criminal Justice (Scotland) Act 2003 could be an appropriate example⁷.

We are of the view that parole hearings could work well on Webex as this avoids the need for everyone to travel to a single location and allows all parties to observe the hearing. We consider that more progress should be made by the parole board in this regard. We understand that parole hearings may have taken place by audioconference and we take the view that this is an ineffective way of proceeding because it limits engagement.

Question 5 - Which of the following best expresses your view of the proposal that victims should have the right to request exclusion zones are imposed on offenders on their release to offer more protection to victims and their families?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure
- No comment on this policy proposal – skip to next question

Please explain the reasons for your response. Please include any comments on the specific issues underlined in the consultation document on this proposal.

Neutral – We are of the view that victims and their families addresses should not be revealed and support provisions that would impose restrictions which would restrict access, contact and approaches being made in a similar fashion to those imposed at present in relation to release on bail. However, we consider that this proposal could be a double-edged sword - if the prisoner does not know where the victim or their family lives then to seek the imposition of a so-called exclusion zone might disclose their whereabouts to the prisoner.

⁶ [Criminal Justice \(Scotland\) Act 2003 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁷ [Criminal Justice \(Scotland\) Act 2003 \(legislation.gov.uk\)](https://legislation.gov.uk)

We submit that electronic monitoring could be a useful tool for post release monitoring. We note that section 5 of the Management of Offenders (Scotland) Act 2019⁸ has yet to be brought into force. We recognise that it would allow Scottish Ministers to ‘additionally require’ the prisoner to submit to monitoring as a condition of their release.

Question 6 - Which of the following best expresses your view of the proposal that there should be an explicit requirement that the safety and welfare of victims and their families is considered during parole hearings and temporary release applications?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure
- No comment on this policy proposal – skip to next question

Please explain the reasons for your response. Please include any comments on the specific issues underlined in the consultation document on this proposal.

Neutral – We note that such a requirement already exists. Rule 2 (3)(e) of The Parole Board (Scotland) Amendment Rules 2021 state that the Board must take “the safety or security of any other person, including in particular any victim or any family member of a victim, were he or she to be released on licence, remain on licence, or be re-released on licence as the case may be.”⁹ into account.

Question 7 - Which of the following best expresses your view that victims of crimes are given access to the reasons in full as to why the parole board or prison governor has come to a decision to release an offender?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure
- No comment on this policy proposal – skip to next question

⁸ [Management of Offenders \(Scotland\) Act 2019 \(legislation.gov.uk\)](#)

⁹ [The Parole Board \(Scotland\) Amendment Rules 2021 \(legislation.gov.uk\)](#)

Please explain the reasons for your response. Please include any comments on the specific issues underlined in the consultation document on this proposal.

We are **partially opposed** to the proposals.

We firmly believe that the legitimate interests of victims and their families to be given reasons for decisions need to be balanced with the safety of the prisoner after their release. We have previously expressed our support for parole boards providing reasons for their decisions and suggested that concise reports should be provided to relevant parties¹⁰. We note that the Parole Board (Scotland) Amendment Rules 2021 came into force on 1 March 2021 which requires the board to provide anonymised summaries of the reasons for its decisions. This is a welcome step forwards as regards ensuring that interested parties are kept informed and that the process is transparent.

Question 8 - Which of the following best expresses your view of the proposed aims of implementing Suzanne's law, whereby an offender convicted of murder could be denied release on the grounds that they have failed to disclose the location of the victim's body?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure
- No comment on this policy proposal – skip to next question

Please explain the reasons for your response. Please include any comments on the specific issues underlined in the consultation document on this proposal.

We would **partially oppose** the suggestion that there should be a presumption against release if the accused refuses to disclose the location of the body of their victim. We are of the view that each case should be decided on its own facts and circumstances.

Question 9 - Which of the following best expresses your view of the proposal to allow all victims to make a Victim Statement to court?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed

¹⁰ [crim-transforming-parole-in-scotland-27-03-2019.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk/~/media/Files/2019/03/2019-03-27-crim-transforming-parole-in-scotland-27-03-2019.pdf)

- Fully opposed
- Unsure
- No comment on this policy proposal – skip to next question

Please explain the reasons for your response. Please include any comments on the specific issues underlined in the consultation document on this proposal.

We are **partially supportive** of the proposals. We would reiterate our comments made at question 4 above.

We acknowledge that the current provisions limit the inclusion of victim statements to solemn proceedings only. Our response to the 2019 Scottish Government consultation – Widening the scope of the current victim statement scheme welcomed the consideration of allowing submission of victim statements to a specific list of summary offences¹¹. We noted that this limited scope would necessarily incur resource and cost implications on what was an already heavily burdened justice system prior to the covid-19 pandemic. This current consultation proposes to widen the inclusion to all victims regardless of the nature of the offence. We note that the consultation is silent regarding the financial implications of this proposal in the current climate and further does not address the implications of supporting those wishing to make a victim statement.

Question 10 - Which of the following best expresses your view of the proposal for all victims to have the right to be notified of a decision not to prosecute their case?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure
- No comment on this policy proposal – skip to next question

Please explain the reasons for your response.

Neutral - Under S.6 of the Victims and Witnesses (Scotland) Act 2014 victims have an existing statutory right to request information from COPFS in relation to their case. The information that a victim may request, and COPFS must provide, includes any decision not to institute criminal proceedings and the reasons for the decision.

COPFS stated policy is to go further than this statutory obligation, by proactively notifying all victims of case outcomes in all cases which fall within the remit of the Victim Information and Advice (VIA) service.

¹¹ [2019-11-22-crim-widening-the-scope-of-the-current-victim-statement-scheme.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk/2019-11-22-crim-widening-the-scope-of-the-current-victim-statement-scheme.pdf)

- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure
- No comment on this policy proposal – skip to next question

Please explain the reasons for your response.

Partially supportive – We are of the view that the current delays in bringing Fatal Accident Inquiries (FAI's) to court are unacceptable.

A recent paper by Sheila M Bird 'Fatal Accident Inquiries into 83 deaths in Scottish Prison custody 2010-2013'¹³ found that 53 of the 83 deaths within 2010 to 2013 took at least 2 years to reach a FAI. More must therefore be done to ensure that FAIs take place and are concluded timeously. However, the application of statutory timescales to deaths investigations and FAIs is not straightforward and would require both a detailed proposal and the proper testing of same.

All suspicious, sudden and accidental deaths are reported to the Procurator Fiscal. Dependent on the circumstances of the death, the investigation of the circumstances of the death may be conducted by, inter alia, the Police, Specialist Reporting Agency such as the Health and Safety Executive or statutory body such as the Air Accident Investigation Branch (AAIB). Dependent on the circumstances of the death, separate agencies may conduct parallel investigations. The results of the investigations are reported to the Procurator Fiscal and a decision made on whether further action is required, whether criminal proceedings and/or an FAI. Criminal proceedings would normally have primacy i.e., a decision taken on criminal proceedings, and any consequential criminal proceedings concluded, prior to the conduct of an FAI.

Under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (the 2016 Act) FAIs are mandatory in specified circumstances. However, under section 3 of the 2016 Act the Lord Advocate may decide that an otherwise mandatory FAI is not to be held in specified circumstances, including where satisfied that criminal proceedings have sufficiently established the circumstances of a death. Such a decision would normally be taken after the conclusion of the relevant proceedings.

Where an FAI is not mandatory, under section 4 of the 2016 Act the Lord Advocate has discretion to decide that an FAI should be held into a death. It is understood that such a decision would normally only be taken at the conclusion of the investigative process described above and the conclusion of any related criminal proceedings. It is not obvious from the consultation proposal how maximum timescales might realistically work given the complex investigative process involved in properly establishing the circumstances of some deaths and the relationship between criminal proceedings and the FAI decision making process.

¹³ <https://www.cambridge.org/core/journals/bjpsych-open/article/fatal-accident-inquiries-into-83-deaths-in-scottish-prison-custody-20102013/F60E8B0FE645CEE06A9DB52C01FE5A9D>

However, we are in no doubt that delays in the FAI system have an enormous impact upon those affected. We appreciate that there may be delays which are attributable to specific evidential complexities and that there are current concerns about resourcing and prioritisation of FAI's. Anecdotally FAI's appear to come low in the "pecking order" when it comes to allocating court time and we would submit that a more robust regime must be implemented to ensure that FAI's are commenced within a reasonable timescale given the overarching public interest in learning lessons from deaths and the interests of the families in seeing that justice is done.

Question 13 - Which of the following best expresses your view of the proposal to expand the list of circumstances where deaths are automatically investigated through the fatal accident inquiry process?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure
- No comment on this policy proposal – skip to next question

Please explain the reasons for your response. Please include any comments on the specific issues underlined in the consultation document on this proposal.

Fully opposed - There are a few reported cases in which the Court of Session refused to intervene in decisions of the Lord Advocate not to hold a discretionary FAI. See for example *Emms, Petitioner* 2011 Sc 433, *Kennedy v Lord Advocate* 2008 [CSOH] 21 and *Al Fayed v Lord Advocate* 2004 SC 568. In the first two of these the court expressed acknowledged the scope of the Lord Advocate's discretion and noted that this would not be readily interfered with. In one of the cases can it be said that there was a lack of a proper investigation into the circumstances surrounding the death.

Question 14 - Taking into account all those likely to be affected (including public sector bodies, businesses and individuals etc), is the proposed Bill likely to lead to:

- a significant increase in costs
- some increase in costs
- no overall change in costs
- some reduction in costs
- a significant reduction in costs
- unsure

Please indicate where you would expect the impact identified to fall (including public sector bodies, businesses and individuals etc). You may also wish to suggest ways in which the aims of the Bill could be delivered more cost-effectively.

Some increase in costs – It is clear that time and resources will be required to achieve the proposals to extend the victim statement scheme and to automatically inform a complainer that no proceedings are being taken.

Question 15 - What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation?

- Positive
- Slightly positive
- Neutral (neither positive nor negative)
- Slightly negative
- Negative
- Unsure

Please explain the reasons for your response. Where any negative impacts are identified, you may also wish to suggest ways in which these could be minimised or avoided.

Unsure – we have no comment to make here.

Question 16 - In terms of assessing the proposed Bill's potential impact on sustainable development, you may wish to consider how it relates to the following principles:

- living within environmental limits
- ensuring a strong, healthy and just society
- achieving a sustainable economy
- promoting effective, participative systems of governance
- ensuring policy is developed on the basis of strong scientific evidence.

With these principles in mind, do you consider that the Bill can be delivered sustainably?

- Yes
- No
- Unsure

Please explain the reasons for your response.

Unsure – we have no comment to make here.

Question 17 - Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses to earlier questions)?

We have no comment to make here.



For further information, please contact:

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