

# **PE2085/W: Introduce a statutory definition of residency for Fatal Accident Inquiries into the deaths of Scots abroad**

**Billy Milligan written submission, 10 February 2026**

I support PE2085 and urge the Scottish Government to legislate explicitly, in statute, for what it means to be “ordinarily resident” for the purposes of sections 6–7 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. The absence of a statutory definition has produced uncertainty, inconsistency, and, for too many families, injustice. This uncertainty is not an academic quibble; it directly affects workers and families in Scotland’s globally engaged economy.

I work in a large company with an international footprint. It is normal for us to send staff abroad on multi month and multi year assignments. If people who are posted abroad on legitimate, time bound secondments can later be judged not “ordinarily resident” (OR) in Scotland, families are left without recourse to a Scottish investigation or FAI when tragedy strikes overseas. The Lord Advocate’s office has acknowledged that, “in relation to most deaths,” OR will be clear, but also gave examples where those living and working abroad “for many years” are extremely likely not to be OR; the difficulty is that, in practice, even periods of only months abroad have been used to deny OR, and thus jurisdiction, in multiple cases.

The pattern described by the petitioner and parliamentarians, that dozens of Scots who died overseas were determined not OR despite being abroad only a matter of month, aligns with my professional experience of how commonplace such durations are for secondments. That threshold is far shorter than many of our projects. It is unreasonable that ordinary workforce mobility can inadvertently sever a Scottish worker’s access to an FAI.

The Cabinet Secretary argues that “ordinarily resident” is well established in common law (citing Shah) and that a statutory definition would not improve outcomes. The Shah test centres on a person’s voluntary, settled mode of life “for the time being,” of short or long duration, assessed by objective facts. But relying solely on case law, developed in very different statutory contexts, has evidently not delivered clarity or consistency for Scots bereaved by deaths abroad.

The Lord Advocate’s submission confirms there have been no FAIs to date for deaths abroad, albeit “some deaths are currently being investigated,” and reiterates that changes to legislation are for Parliament. If the current framework were functioning as intended, we would not see a zero FAI outcome more than seven years after the 2016 Act. The experience described by families and their representatives demonstrates that process updates (style letters, MoUs, web pages) have not fixed the fundamental OR problem.

Both the Lord Advocate and the Cabinet Secretary point to Lord Cullen’s view that, out of respect for foreign authorities, FAIs into deaths abroad “might be exercised

rarely.” Respectfully, this single line has acquired a talismanic quality in official responses. “Might” is doing some incredibly heavy lifting here and has become a shield for inaction. “Rarely” should mean exceptional on the facts, not never as a matter of practice. The Government’s own explanatory material records that the intention was to enable FAIs into deaths abroad, not to create a de facto bar. The safest way to realign practice with Parliament’s 2016 intent is to put the residency test on a statutory footing

It is striking that the Justice Secretary’s and Lord Advocate’s submissions both deploy the same Cullen line to justify the current outcome (zero FAIs). At best, this signals an overly narrow, coordinated reading of the Review; at worst, it implies an institutional alignment to keep the bar high without the anchor of clear statute. Either way, it underscores why Parliament, not prosecutorial policy, must settle this with legislation.

Ministers caution that Scotland’s system differs from coroners’ inquests in England and Wales. But the point is not sameness, it is effectiveness. Inquests into deaths abroad in England and Wales routinely proceed despite the same inherent difficulties of foreign cooperation. That jurisdiction has found workable pathways; Scotland’s practical outcome has been none. That divergence suggests our test (and its application) is too uncertain and too strict.

There have been process improvements (new guidance, style letters and Minute of Agreement), but they do not give families a predictable, reviewable standard in law. They also do not cure documented issues in communication and timeliness raised. Even the Procurator Fiscal’s recent letter, while courteous, ultimately says COPFS is bound by current legislation and will obtain “further information . . . where we can.” Families need more than “where we can”; they need when we must. Only Parliament can provide that.

The Deputy Chief Constable offers a high level summary of roles and says the current definition is “sufficient.” That submission reads like a 30,000 foot process overview and brings little to the central question the petition raises: what is the legal threshold for OR and how is it consistently applied?

It’s plain that parliament should now legislate a clear, statutory definition of “ordinarily resident” for FAIs into deaths abroad. Draw on established UK case law (e.g., Shah) but translate the principles into predictable statutory factors e.g., voting registration; tax/N.I. contributions; UK mortgage/home or tenancy; UK bank accounts; UK employer/contract; family base and schooling; frequency of return; documented secondment terms, each weighted and evidenced. This mirrors how statute has clarified residency tests in other domains (education, tax, nationality guidance).

It would also be of interest to Scotland’s global workforce to create a rebuttable presumption that a person on a time limited overseas secondment from a Scottish employer remains ordinarily resident in Scotland unless contrary factors (e.g., permanent relocation with intent, deregistration from UK ties) clearly outweigh it. This directly protects them.

Ministers and the Lord Advocate have said, in effect, “if Parliament legislates, COPFS will implement.” Then Parliament should legislate. Scotland’s bereaved families deserve a system that is predictable, transparent and just, not one that depends on a malleable common law term applied behind closed doors, sometimes years after the fact.

Finally, and I choose my words carefully, were malign actors in some of the world’s more lawless places to conclude that Scotland is reluctant to hold inquiries into Scots who die overseas in sudden or suspicious circumstances, it risks sending the worst possible signal. Clear law will never eliminate every danger, but it will close a perceived gap. Legislating a robust, statutory OR test would protect Scottish workers and families, uphold public confidence, and honour the intention behind extending FAIs to deaths abroad in the first place.