

## **RESPONSE BY ABERDEEN SHERIFFS TO REVIEW OF FATAL ACCIDENT INQUIRY LEGISLATION**

The sheriffs in Aberdeen has been involved in all types of fatal accident inquiries, but have also significant experience of FAIs arising out of deaths on board offshore oil installations and deaths in prison. In general, the view is that the current system works well and should not be altered.

### **QUESTION 1**

Should there be any change in the purpose or the features of FAIs?

**No and Yes.** No in the sense that there should not be any change in the purpose, in the sense that the present system works well and any attempt to convert FAIs, or any particular FAI, into a public inquiry, e.g. into safety on board installations in the North Sea, ought to be resisted.

Yes in that one unfortunate aspect of some FAIs is the delay on the part of the Crown in holding the inquiry. In some cases, nearly 3 years have elapsed since the death. That ought not to happen. In the first place, it may be more distressing than need be. By that time, those involved in the death will have begun to adjust to the death, and they will be required to "re-live" the events. If an accident occurs, a responsible body will ensure that the necessary changes are made, perhaps following the intervention of the Health and Safety Executive. An FAI which takes places 3 years on is therefore somewhat pointless. If, by contrast, the body is not responsible, it may continue with its bad practices until the outcome of the FAI which ought to be held as soon as possible to prevent any recurrence, or continuation of bad practice.

An FAI should not be able to apportion blame. In many instances, it will be obvious, reading between the lines, that someone was to blame. Apportioning blame is, however, a matter for another forum and the two should nor be confused. Anyone who thought that blame might be attributed, would probably wish legal representation which might lengthen the duration of such FAIs.

### **QUESTION 2**

Should FAIs be held in some forum other than the sheriff court?

**No.** The sheriff is used to dealing with complicated matters. The sheriff can compel witnesses. Court buildings are specifically designed to deal with accommodation for witnesses, storing of productions etc. Any new venue would cost money and would be unlikely to be used full-time. There should be power, if it does not already exist, to compel the attendance of witnesses from anywhere in the UK. If that is accepted, consideration ought to be given to compelling witnesses from the EU

### QUESTION 3

Should specialist procurators fiscal handle FAIs? (Please tick one box)

**No.** The proper conduct of an FAI points to its being dealt with by an experienced fiscal. Any fiscal who has experience of presenting material for a solemn or summary criminal trial ought to be capable of marshalling the material for an FAI, and thus ought to be capable of assimilating complex material, e.g. relating to health and safety legislation.

It is a matter for the Lord Advocate to decide who should conduct such an Inquiry. In the past, it was not unknown for the Lord Advocate himself to conduct such an inquiry, and in cases of particular importance, or complexity, Crown counsel, or other experienced counsel could be used.

### QUESTION 4

Should the scope of the Act be altered so as to cover FAIs into the death of a Scot abroad?

**No.** However, it seems to have been decided at government level that the Act should be extended to deaths of serving with the armed forces.

To extend the scope of the Act beyond those persons would give rise to considerable problems. Among those would be the absence of investigatory powers, the cost of bringing witnesses from abroad, (many of whom might not be compellable, and even if they were, might not turn up), translation costs, and defining precisely the circumstances in which such an FAI would be competent. If there could be an FAI in respect of the death of any Scot abroad, that would be too wide. That possibility would, for example, include an investigation into the death of someone killed on a road in France. A similar inquiry in France might come to a different conclusion, e.g. the FAI in Scotland might conclude that the cause of death was the poor state of the road surface, whereas the French inquiry might conclude that the vehicle's brakes were the cause.

### QUESTION 5

Should it be possible for FAIs to be held, where appropriate, into multiple deaths in more than one jurisdiction?

**Yes,** if this means more than one jurisdiction within Scotland. However, such an FAI would be appropriate only if the death resulted from a common cause, e.g. food poisoning. That would allow the sheriff to take an overview, and would cut down on the need for the same witnesses to give evidence on exactly the same matters, but in a number of courts.

### QUESTION 6

Should the deaths which fall within the mandatory category be changed?

**Yes**, certain deaths should be added.

It should also cover those who are detained under the Mental Health (Care and Treatment)(Scotland) Act 2003. Deaths of children in care should also be within the ambit.

#### QUESTION 7

Should the requirement to hold an FAI into a death which falls into the mandatory category be subject to exception?

**Yes**. It should not be necessary to hold an Inquiry if it is clear that the person died from natural causes. There is little point in conducting an inquiry into the death of a 65-year old prisoner who had had cancer for the last 5 years. Frequently, no one other than the prison authorities turn up at such an FAI, and the cause of death is known and clear in advance. It would, however, be open to the relatives to request that an FAI be held, if they were of the view that although the death appeared to be from natural causes, there was some omission, e.g. a failure to treat a person timeously.

Equally, it should not be necessary to conduct an FAI where all of the circumstances have been aired in criminal proceedings.

**Some of the sheriffs** are of the view that the role of the Lord Advocate since the coming into force of the Scotland Act has changed in that the Lord Advocate is almost solely responsible for the prosecution of crime, and is also a member of and answerable to the Scottish Parliament. The Lord Advocate ought not to be in a position of being under pressure from an MSP to hold an inquiry, merely because a constituent wants one. It is therefore a matter for consideration whether the responsibility for holding FAIs ought to be transferred, e.g. to the Advocate-General.

**Others** would leave the responsibility with the Lord Advocate.

#### QUESTION 8

Should other interested parties be able to make representations to the Lord Advocate during the decision making process?

**No**. It is difficult to envisage anyone who would fall into this category who would not otherwise be entitled to be represented.

The definition of "relative" might have to take account of non-marital relationships.

#### QUESTION 9

Where the Lord Advocate decides not to hold an FAI, should a formal, reasoned decision be provided to relatives of the deceased?

**Yes.** The decision is an administrative one and as such, is subject to judicial review

QUESTION 10.

Is adequate notice given to interested parties in advance of an application being made?

**Yes.** We are not aware of significant difficulties being encountered.

QUESTION 11

Is adequate advice, information and support provided to the relatives of the deceased?

If there are cases where because of legal aid, a person who would wish to be represented cannot afford that representation that is not acceptable. The Crown's position in an FAI is neutral, but there may be issues which the relatives would wish to be aired, and they should have an opportunity of addressing the Court on whether such lines ought to be pursued.

QUESTION 12

Is the current approach to the provision of legal aid to relatives appropriate?

See the answer to Q. 11

QUESTION 13

Should provision for preliminary hearings be made in respect of the whole of Scotland?

**Yes,** but they should be at the discretion of the sheriff and not mandatory.

At a preliminary hearing, the Crown ought to be able to identify the witnesses, the steps taken to cite them and to identify the productions on which they wish to rely. That gives the sheriff an opportunity to consider the material and comment on further preliminary procedure. There have been examples of the Crown not producing certification of the advertisement. That is unacceptable, e.g. when it happens on the first morning of the FAI, and an adjournment is required.

QUESTION 14

Should evidential material be provided to parties in advance of the FAI?

**Yes.** It should be available at any preliminary hearing.

QUESTION 15

Should there be relaxation of the conditions under which signed and sworn statements can be used?

**No.** There is scope for matters being agreed by joint minute and hearsay evidence is admissible.

#### QUESTION 16

What can be done to ensure that the most authoritative independent experts are selected to give evidence at FAIs?

It is matter for those who conduct the Inquiry or are represented at it to decide what type of expert, if any, is required and there are readily-available lists of experts in a variety of areas. It is important that appropriate experts are used, e.g. a paediatric pathologist may be a more appropriate expert than a general one.

#### QUESTION 17

Is there a place for expert assessors in FAIs?

**Yes,** but only at the discretion of the sheriff and the situations would be rare.

#### QUESTION 18

Should the evidence of a witness at an FAI be inadmissible in other judicial proceedings?

**Some sheriffs say “No,”** because the purpose of an FAI is to determine certain facts, and to reach a legal conclusion based on these facts. However, the purpose of an FAI is primarily to determine the cause of death. Witnesses should therefore not feel constrained by the possibility that they or others might be exposed to civil action or criminal proceedings, and therefore be less open in their evidence than they would be if no such constraint existed.

**Others** are of the opinion that an FAI is another form of court proceedings and if, for example, evidence emerges which suggest that there has been fault which may be the subject of subsequent civil action, a witness’s testimony at the FAI ought to be admissible. A witness at an FAI already has the benefit of the protection against incrimination in respect of criminal proceedings.

#### QUESTION 19

Should there be guidance as to matters which should be covered by determinations?

**No.** The guidance is the Act, any Inner House decisions, or judicial review decisions. The sheriff should not have his or discretion fettered beyond that.

QUESTION 20

Would it be helpful to create an up to date public database of determinations?

**Yes.** These are proceedings held in public.

QUESTION 21

Should responses to recommendations be monitored?

**Yes,** but it is a matter for agencies other than the courts. Whoever institutes an FAI in the public interest would seem to have an interest in ensuring that any recommendations are given proper consideration.

QUESTION 22

Should the Lord Advocate be able to apply for a further FAI or the re-opening of an FAI?

**Yes,** but only in the event that fresh evidence comes to light which was not available and could not with reasonable diligence have been made available at the original hearing.