

Review of Fatal Accident Inquiry Legislation

Introduction

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This questionnaire document accompanies the consultation paper and is intended for you to record your responses to the questions raised within the paper. The questions which appear in the consultation paper are presented in full below and are numbered and are ordered as they appear in the consultation paper.

You should read through the consultation paper and then record your answer to each question in the space provided. Please answer as many questions as you wish; you do not need to answer all of the questions if you do not wish to do so.

If you have any queries please contact Andrew Mackenzie on 0131 225 5972.

Respondant Information Form

Please complete the details on the Respondent Information Form below. This will help ensure we handle your response appropriately.

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1. Are you responding as: (please tick one box) * Required

- An individual (go to Q2a/b and then Q4)
 on behalf of a group or organisation (go to Q3 and then Q4)

2a. INDIVIDUALS

Do you agree to your response being made available to the public on the Review of Fatal Inquiry

- Yes (go to 2b below)
 No, not at all (We will treat your response

Legislation website?

as confidential)

2b. Where confidentiality is not requested, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

3. ON BEHALF OF GROUPS OR ORGANISATIONS

The name and address of your organisation **will be** made available to the public on the Review of Fatal Inquiry Legislation website. Are you also content for your **response** to be made available?

- Yes
- No we will treat your response as confidential

Consultation Questions

QUESTION 1

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

- Yes
- No

QUESTION 2

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

- Yes
- No

Subject to the suggestions below in relation to the use of specialist/expert Procurator Fiscals and Sheriffs.

QUESTION 3

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

- Yes
- No

Please explain your answer

Yes. While it may be suggested that some FAIs are more straightforward than others, all will require specialist knowledge in the particular field of that Inquiry. That includes specialist knowledge of the nature and existence of certain documentation which would assist the court. That is particularly so in relation to complex medical or technical Inquiries where, at present, a Procurator Fiscal may be reliant on a family representative who has that specialist knowledge to draw out the existence of information and documentation. Such dependency not only relies on the family having its own representative and that family representative having specialist knowledge but is also reliant on the particular Fiscal being willing to pick up and push such points. To rely on all of these features does not ensure the consistent and smooth running of such Inquiries. Given that they are representing a wider interest than any other solicitor in the Inquiry, specialist knowledge and training of Procurator Fiscals for such complex Inquiries is essential. Many Procurator Fiscals currently are uncomfortable conducting Inquiries due to the fundamental differences between a Fiscal's areas of expertise and the Inquiry process. Thought may even be given to the secondment into Inquiries of "civil" practitioners whose expertise is more suited to the role of an Inquiry.

In addition, in a complex Inquiry, it would be sensible to have a Sheriff specifically trained in the area in the same way that other areas of law and court practice are becoming more specialist.

If you answered yes, above, should they be part of a centralised team dedicated to FAIs? (Please tick one box)

- Yes
- No

Please explain your answer

Teamwork would bring with it learning, consultation and leadership all of which would be to the benefit of members of that team and outward to the whole Inquiry process. On the other hand, there will very often be clear benefits in local knowledge and, particularly for the families, local representation. Specialist Fiscals should be centralised administratively, not geographically.

QUESTION 4

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

- Yes
- No

Please explain your answer

In many ways this question has perhaps been addressed already in the public domain, at least with indications that such deaths will result in Inquiries being held in Scotland rather than elsewhere, for example the Nimrod disaster. The appropriateness of this seems obvious and sensible in today's global society. Extending the question to compellability of witnesses and recovery of documents outwith Scotland, consideration should be given to procedures to compel attendance and production of documents to address existing restrictions on the powers of Inquiries.

QUESTION 5

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

- Yes
- No

Please explain your answer

Prudence and sense would suggest that where possible any local jurisdictional issues could be overcome with the aim of conjoining such an Inquiry to enable consistency while ensuring an opportunity is available for all concerned to take part in such an Inquiry.

QUESTION 6

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

- Yes, certain deaths should be added
- Yes, certain deaths should be removed
- Yes, both additions and removals should be made
- No, no change should be made to the mandatory category

If you answered yes, that deaths should be added or removed, please explain your answer.

In our view, it is essential that FAIs continue to take place in relation to deaths in police stations and indeed in prisons. Following the theme of ensuring that individuals' rights are protected where held in "full control" environments, it is our view that this category should be extended to cover those held under the Mental Health Regulations either voluntarily or in a compulsory manner. We draw support for our view from the recent House of Lords' decision in Keenan. That would equally apply to the deaths of any children who are in care or in a fostering environment.

In our view there is a strong argument that deaths of people at their place of work and those in hospitals remain mandatory.

QUESTION 7

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

- Yes
- No

Please explain your answer

While it may be argued that such an exception should be in place - for example, for the sake of some families who do not wish an FAI - to have such an exception would not address the public interest issues that exist. In the example where the family do not wish to be involved in the Inquiry, they do not require to take part. Such an Inquiry may still be to the benefit of the public at large. In particular, it may address whether any precautions could or should have been taken to avoid the death and make consequent recommendations for future situations.

QUESTION 8

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

- Yes
- No

If yes, which parties should be able to make representations?

To extend this beyond the family consultation would delay a process that is already extremely slow. It is essential that the family/relatives' views continue to be taken into account and are an important factor in any decision as to whether an FAI takes place. A family will want answers to questions to allow them to feel they have achieved as much as possible on behalf of their loved one and to move forward. It is often unlikely that the family will obtain these answers in any other environment, whether mediation, through any complaints process or in civil litigation. If a family feels strongly that an FAI is to take place that should be a heavy factor weighing in favour of an FAI.

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
- No

Please explain your answer

This is an important decision, not only in the widest sense publicly but also for the family. It is essential in our view that a reasoned, detailed and clear decision is given. That will ensure the maintenance of natural justice as well as building faith in this part of the legal system.

In some cases where a decision is taken not to hold an Inquiry with no detailed reason, and where the family feels strongly that one should have been held, the lack of a detailed reason in further considerable distress to an already difficult situation. We have experience of families in such a situation seeking advice to identify and consider any other route to seek to challenge the undefined decision whether by way of formal or informal routes. A reasoned decision would give clarity for all and allow swifter resolution of such further avenues.

QUESTION 10

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

- Yes
- No

If no, please explain your answer and outline what you feel would be adequate notice.

It is our view that notice given is adequate but experience has shown that procedural hearings are perhaps not used as effectively as possible with resultant delay in the Inquiry itself while further information is obtained/produced. The expectation that all parties will voluntarily disclose all relevant documents to an Inquiry is, in our experience, misplaced. Indeed a situation has arisen where an interested party has been forced to produce extremely relevant information in the course of an Inquiry only after the Procurator Fiscal has threatened to use the powers of search and after strong indications from the Sheriff that documentation should be produced voluntarily. It may be considered appropriate to expressly state within the process that interested parties who have control, for example, over the environment in which a person died e.g. a mental health institution, a care home or hospital, or control of equipment being used, is obliged to disclose all potentially relevant documentation at or prior to the first procedural hearing to the Inquiry commencing proper.

QUESTION 11

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

- Yes
- No

If no, what improvements could be made?

We have not answered yes or no to this question as it depends on the circumstances on a case by case basis. There seems little doubt that the Procurator Fiscals are generally extremely helpful and supportive of the families. However their resources are very limited and in great demand and therefore they are not able to provide the emotional (and on occasions we suspect factual support) that both the Procurator Fiscals would like to provide and the family would wish to receive.

Another fundamental area where relatives are not supported is in relation to the funding of their representation at an Inquiry. Very few are eligible for Legal Aid. Those few with the resources to fund representation privately take on a heavy and to some extent open ended responsibility, particularly in complex cases. Ironically it is those very cases where family representation may well be essential if Procurator Fiscals do not have specialist knowledge.

We suspect many solicitors acting in this arena have experience of families being unable to be represented at an Inquiry because of the lack of eligibility for Legal Aid and equally the lack of ability to privately fund separate representation. This cannot be seen as appropriate in a specific environment where access to justice has to be seen as essential. It has the ability to tarnish the system and leave members of the family having to cope with the inability to represent their loved one and obtain answers. Therefore in Fatal Accident Inquiries there should be an additional funding option available for families along with the ability to recover costs in the Inquiry and in any civil proceedings that may follow.

QUESTION 12

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

- Yes
- No

Please explain your answer.

See answer 11 above. Frequently, particularly in complex cases, a family is not on an even playing field with other interested parties. That inequality of arms may result in a decision by the families not to be represented which goes against their strong desire to be represented either due to lack of eligibility to Legal Aid or the costs of privately funding. That may well taint public faith of this part of the legal system.

It may also fundamentally prevent essential information coming to the Inquiry that would be relevant to the determinations that require to be made, particularly in the absence of specialist Procurator Fiscals.

The Procurator Fiscal is there essentially to represent the public interest. He or she does not (and indeed cannot) simply represent the relatives. Fundamentally if a

family wishes to be represented and a Sheriff is of the view that it would be appropriate to allow that representation, then the Sheriff should be able to grant it without risk of challenge by the public funder. The issue of funding can be one for the particular Sheriff in the particular circumstances of the case, e.g. funding by way of assistance by way of representation. Similarly, public funding should be sufficient to fund representation from suitably experienced representatives.

QUESTION 13

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

- Yes
- No

Please explain your answer.

We refer to answer 10 above. There exists a considerable time lapse between the date of death and an Inquiry and any procedural hearings used fulsomely can only assist in moving that forward as quickly as possible. Procedures should also be tightened to ensure that delay between the date of death and the Inquiry is minimized.

QUESTION 14

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

- Yes
- No

Please explain your answer.

For the same reasons as in answers 10 to 13 above and to allow agents to properly test conflicting evidence to ensure the purpose of the Inquiry is fulfilled..

QUESTION 15

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

- Yes
- No

Please explain your answer.

Oral evidence should remain the best evidence if possible. On some occasions parties can and are willing to agree documents. However it is less likely in complex cases. The weight of evidence to be given to formal documents is ultimately for the Sheriff.

While some may suggest that it is for Crown Office to identify authoritative experts, that can only be achieved if the Procurator Fiscals are specialist in that area. If they have that specialism, there is no difficulty with the suggestion that Crown Office identify experts. If the Fiscals are not sufficiently specialised, that may have a negative effect on the eventual outcome of the Inquiry. Specialism is therefore key to Inquiries.

QUESTION 16

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

Specialism, knowledge and expertise of the Procurator Fiscals and their team.

QUESTION 17

Is there a place for expert assessors in FAIs? (Please tick one box)

- Yes
- No

If yes, should more use be made of them? (Please tick one box)

- Yes
- No

Please explain your answer.

No. In our view, independent experts properly identified and instructed by the Procurator Fiscal or indeed by any other party should be sufficient to ensure that all avenues are investigated to a Sheriff's satisfaction.

QUESTION 18

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

- Yes
- No

Please explain your answer.

No. We note the suggestion in the commentary that witnesses are likely to be more truthful simply because they know that their evidence cannot be used against them in other proceedings. In reality, individuals giving evidence at an Inquiry are aware that they are in a full blown litigation environment and behave accordingly. To make such evidence inadmissible may well damage the reputation of the Inquiry process itself. It

may well also cause duplication and extra cost not only to the bereaved families but to other interested parties if another litigation follows on the back of such an Inquiry.

In addition, witnesses are under oath and as such are obligated to be truthful regardless of the use of that evidence at a later date.

QUESTION 19

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

- Yes
- No

Please explain your answer.

Again on this occasion we have not answered yes or no to this question as much will depend on the specialist expertise of the Sheriffs who hear and conduct FAIs. If such a system was in place then additional guidance may be unnecessary as such training and specialism should bring with it a quality and consistency of approach that lends further guidance unnecessary. If the present system remained however then guidance may be necessary but difficult to formulate.

QUESTION 20

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

- Yes
- No

Please explain your answer.

No. The Scottish Courts website is sufficient. If not already in existence, it would be helpful however on the Procurator Fiscal's website to have a link through to the Scottish Courts' website for ease of use by the public.

QUESTION 21

Should responses to recommendations be monitored? (Please tick one box)

- Yes
- No

Please explain your answer.

Much of the benefit to be gained from a determination is in the follow through. A proper form of audit to ensure implementation is an essential part of a Fatal Accident Inquiry process.

If yes, should this be done centrally and by whom? (Please tick one box)

- Yes
- No

Yes, audit of recommendations should be performed centrally to ensure consistency. Given that many Inquiries relate to deaths of individuals within state owned or state funded environments, it would be prudent to ensure transparency and independence that the organisation tasked with audit and ensuring implementation was wholly independent of the Scottish Government.

If yes, to whom should any report be made?

QUESTION 22

Should the Lord Advocate be able to apply for a further FAI or the re-opening of an FAI? (Please tick one box)

- Yes
- No

If no, why not?

If yes, should this only be in limited circumstances? (Please tick one box)

- Yes
- No

Please explain your answer.

In our view, the right to apply for a further FAI or to re-open an FAIs should also be available in situations where significant, fresh evidence becomes available which, had it been available within the initial Inquiry, may have had, on a balance of probabilities, an effect of any part of the determination. The same right would have to apply to any other interested party in the Inquiry.

