

MacKenzie A (Andrew)

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Review of Fatal Accident Inquiry Legislation

RESPONDENT INFORMATION DETAILS

Name: Elizabeth White Craigmyle
Organisation: BMK Wilson Solicitors
Address: 90 St Vincent Street Glasgow G2 5UB
Postcode: G2 5UB
Email: ewc@bmkwilson.co.uk
Telephone Number: 0141 221 8004
Responding as: On behalf of a group or organisation
Individual Permission: Not Supplied
Confidentiality: Not Supplied
Group or Organisation: Yes
Share Response Permission: No

Consultation Questions
 Review of Fatal Accident Inquiry Legislation

<p><i>Question 1: Should there be any change in the purpose or the features of FAIs?</i></p>	<p>Yes, We do not consider that the Sheriff Court or the Court of Session are the most appropriate venues for conducting FAIs. FAIs are stressful for family members of the deceased and witnesses and in the Sheriff Court in our experience FAIs are protracted and adversarial as opposed to being run consecutively and in an inquisitorial way. Unless the system has specialist dedication of Sheriffs and practitioners then a tribunal system may be more workable, less stressful and more cost effective. We are aware that in some instances different less formal venues have been used to conduct FAIs due to lack of court space and time. We feel a panel at a tribunal could consist</p>
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	<p>of non legally qualified members with relevant experience but that a legally qualified person would require to issue the Determination. We also consider that there may be some merit in exploring a no fault compensaion scheme for deaths by medical or surgical misadventure similar to the scheme introduced in New Zealand in 1974.</p>
<p><i>Question 2: Should FAIs be held in some forum other than the sheriff court? If yes, what forum would you suggest?</i></p>	<p>Yes, We think that consideration should be given to a Tribunal system. See above., In our experience Sheriff Courts are an uncomfortable and inappropriate setting for FAIs. The proceedings tend to be adversarial. The delays due to other court business and the allocation of time for the FAIs we have been involved in can mean evidence being taken over a period as long as a month and being obtained over a whole year. The disjointed evidence giving adds stress to the families involved and creates additional work and expense. We do not consider the moving of FAIs to the Court of Session is a positive move both in terms of possibly increasing delays and expense.</p>
<p><i>Question 3: Should specialist procurators fiscal handle FAIs? If you answered yes, above, should they be part of a centralised team dedicated to FAIs?</i></p>	<p>Yes, In the FAIs we have been involved in there have been instances of multiple Procurator Fiscals being allocated to each Inquiry causing distress to the families and confusion plus an increase in the workload and expense. It is important that there be expertise in the Fiscal's knowledge and continuity. If a system of specialist Procurator Fiscals was introduced this may improve the system by escalating FAIs to a status where priority is given thus lessening expense and stress and meet reasonable timescales. Regular training would be required of such specialists., Yes, We consider that it is important to have a centralised team which would allow expertise to be shared and to evolve.</p>
<p><i>Question 4: Should the scope of the Act be altered so as to cover FAIs into the death of a Scot abroad?</i></p>	<p>Yes, We consider that the system should allow for investigations into the deaths of Scots abroad.</p>
<p><i>Question 5: Should it be possible for FAIs to be held, where appropriate, into multiple deaths in more than one jurisdiction?</i></p>	<p>Yes, We consider that if there is more than one death from a common cause then one inquiry should be held but that in exceptional circumstances more than one jurisdiction may hold an FAI.</p>
	<p>Yes, certain deaths should be added, Deaths of people (including children in care) detained under The Mental Health (Care and Treatment)</p>

<p>Question 6: Should the deaths which fall within the mandatory category be changed? If you answered yes, that deaths should be added or removed, please explain your answer.</p>	<p>(Scotland) Act 2003 should be included in the mandatory category. In addition where someone becomes ill whilst in police custody but dies in hospital this should result in a mandatory FAI. We consider that there may be a need to amend the 1976 Act to clarify whether an FAI would be mandatory in circumstances where either the Scottish or the UK ministers cause an inquiry to be held into the death under Section 1 on the Inquiries Act 2005.</p>
<p>Question 7: Should the requirement to hold an FAI into a death which falls into the mandatory category be subject to exception?</p>	<p>Yes, We consider that the existing statutory exceptions should continue to apply. The Lord Advocate should continue to have the power to make a discretion as to the holding of an Inquiry being in the public interest.</p>
<p>Question 8: Should other interested parties be able to make representations to the Lord Advocate during the decision making process? If yes, which parties should be able to make representations?</p>	<p>Yes, We consider that any person with an interest should be able to make representations. The importance of a family having legal representation at the decision making stage should be highlighted as in our experience the solicitor acting for the family is often responsible for identifying crucial witnesses and additional evidence following the examination of evidence and interviews with the family and relevant others.. In the interests of justice and to protect the public interest.</p>
<p>Question 9: Where the Lord Advocate decides not to hold an FAI, should a formal, reasoned decision be provided to relatives of the deceased?</p>	<p>Yes, We consider that it is essential that relatives are provided with a formal reasoned decision.</p>
<p>Question 10: Is adequate notice given to interested parties in advance of an application being made? If no, please explain your answer and outline what you feel would be adequate notice.</p>	<p>No, A 21 day notice period is inadequate for proper preparations. If families seek representation many will require to apply for and have civil legal aid in place. Expert opinions may need to be sourced and obtained in complex cases. The most critical comments in relation to our experience of FAIs are the major delays in decision making relating to the granting of the FAI and the duration of Inquiries much to the extreme upset of the families involved coupled with the lack of continuity of a dedicated fiscal. Preliminary hearings in our view are very helpful. We consider that there is a strong case to support specialist sheriffs, fiscals and solicitors. In our experience the relatives wish to be involved and to be kept informed and that they cannot properly grieve or have closure until proceedings are finalised.</p>

<p><i>Question 11: Is adequate advice, information and support provided to the relatives of the deceased? If no, what improvements could be made?</i></p>	<p>No, We regret that our experience is that inadequate information support and advice is provided to relatives. We have previously indicated the difficulties relative to delays in proceedings and change of fiscals throughout the process. In addition civil legal aid cannot be obtained until the Lord Advocate grants the Inquiry and we have encountered time scale difficulties in securing civil legal aid timeously. We have encountered difficulties in securing adequate advice and assistance legal aid to allow us to prepare the civil application. We have also encountered a lack of support for relatives in the course of proceedings and a lack of understanding relating to the Fiscal's role and this could be helped if a system of specialist fiscals was introduced.</p>
<p><i>Question 12: Is the current approach to the provision of legal aid to relatives appropriate?</i></p>	<p>No, We have found the provision of civil legal aid to be difficult necessitating in some cases appeal applications and if granted sanction for counsel and sanction for expert witness costs. Although we have found telephone contact with SLAB in urgent situation to be positive with rapid decision making many grants are given on very short notice as evidence evolves. The practical difficulties have tended to be in securing the Section 1 certificate and although recommendation has been to seek sanction for senior counsel in complex cases we have only been successful in obtaining sanction for junior counsel. We feel that the Sheriff should be informed of the legal aid position at a preliminary hearing.</p>
<p><i>Question 13: Should provision for preliminary hearings be made in respect of the whole of Scotland?</i></p>	<p>Yes, We have found preliminary hearings to be very helpful both to ourselves and to relatives. We consider such hearings to be essential. We would welcome the lodgement of productions at a reasonable period prior to such hearings from all parties and the borrowing and copying of said productions in order that maximum advantage can be taken by the Sheriff at such a hearing to identify the real issues involved. A hearing is also useful in identifying whether the FAI can be held on consecutive days. If there was standardisation of such a process it is likely there would be a minimisation of stress on relatives and overall expense.</p>
	<p>Yes, We have experienced a diversity of practice amongst fiscals. The most workable and transparent practice has been to share the productions prior to the Inquiry. This</p>

<p><i>Question 14: Should evidential material be provided to parties in advance of the FAI?</i></p>	<p>underlines the fact finding nature of the Inquiry as opposed to an adversarial approach. We would welcome standardisation of this practice. We have found this of assistance to the relatives in reassuring them of the inquisitorial nature of proceedings.</p>
<p><i>Question 15: Should there be relaxation of the conditions under which signed and sworn statements can be used?</i></p>	<p>No, We consider that the present system should remain. The preliminary hearing should serve to identify which evidence can be agreed by signed and sworn statements.</p>
<p><i>Question 16: What can be done to ensure that the most authoritative independent experts are selected to give evidence at FAIs?</i></p>	<p>We regret that in our experience major delays have resulted in the Fiscal's inability to find experts willing to give evidence. Some of the Inquiries in which we have been involved have involved very complex medical issues. We feel that a movement towards specialist practitioners will result in data being available re relevant expert witnesses and help can often be gained from other agencies re identification of experts. There can be useful cross over re identify experts via reparation lawyers, voluntary agencies etc.</p>
<p><i>Question 17: Is there a place for expert assessors in FAIs? If yes, should more use be made of them?</i></p>	<p>Yes, Yes, If a tribunal system was adopted then a member with relevant knowledge could be one of the panel. If the current Sheriff Court system is maintained it would be helpful in some cases for the Sheriff to have access to an expert assessor.</p>
<p><i>Question 18: Should the evidence of a witness at an FAI be inadmissible in other judicial proceedings?</i></p>	<p>No, We consider that the evidence a witness gives at an FAI should be admissible other than in exceptional circumstances.</p>
<p><i>Question 19: Should there be guidance as to matters which should be covered by determinations?</i></p>	<p>Yes, Our experience of Determinations is very varied ranging from the relatively short to the very detailed. The recommendations contained in the Determinations have been the result of many days of evidence yet in practice we have found that the recommendations have been ignored or partially implemented which is a waste of public money and the efforts of all to see justice done and this is of particular heartache to families. We feel that specialist Sheriffs could lead to more attention being paid to Determination findings and a push towards ensuring implementation which may avoid future deaths and public expenditure in further Inquiries. It is important that the on going training of Sheriffs is addressed re guidance of what should be covered in Determinations. Relatives also require guidance as early as possible as to what a Determination will cover</p>

	and what attention will be paid to the findings/recommendations as more often than not a family's wish is that any similar death to that suffered by its relative should be avoided in the future.
Question 20: Would it be helpful to create an up to date public database of determinations?	Yes, Yes this is essential and long overdue.
Question 21: (a) Should responses to recommendations be monitored? If yes, should this be done centrally and by whom? If yes, to whom should any report be made?	Yes, We consider that this should be mandatory as the expense in conducting most FAIs is considerable and common sense dictates that recommendations should be implemented as soon as possible and monitored. Many families feel the current system is ineffectual and that they have gone through the whole process for nothing. We consider that the Scottish Parliament should become involved in furthering the introduction of new legislation to impose the introduction of recommendations. We consider that monitoring and analysis could be conducted by the Health and Safety Executive supported by relevant other organisations dependent on the nature of the FAI and the recommendations e.g in medical/nursing cases the relevant professional bodies., Yes, The Health and Safety Executive., The Scottish Parliament.
Question 22: Should the Lord Advocate be able to apply for a further FAI or the re-opening of an FAI? If yes, should this only be in limited circumstances?	Yes, , Yes, Yes in exceptional circumstances the Lord Advocate should have this discretion as this may be preferable to Judicial Review.

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