



RESPONSE

by

FORUM OF INSURANCE LAWYERS (SCOTLAND) (FOIL)

to

CONSULTATION PAPER

on

REVIEW OF FATAL ACCIDENT INQUIRY LEGISLATION

February 2009

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

No.

2. Should FAIs be held in some forum other than the Sheriff Court?

No.

It is felt that many FAIs involve individuals and organisations local to the area where the death occurred. It is important that the relevant FAI is accordingly held in the “local” Sheriff Court.

3. Should specialist Procurator Fiscals handle FAIs?

No.

COPFS should ensure that any Procurator Fiscal allocated to present the evidence at an FAI has had sufficient training in all relevant aspects of FAIs.

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

There have been differing views expressed within FOIL.

Some contributors appreciate that there is an argument that an FAI held in Scotland into the death of a Scot serving in the Armed Forces abroad could have a significant bearing on the welfare of other troops. This group also acknowledge that there is an argument that there might be a strong public interest element in the death of a Scot abroad. They point out however that both possibilities present significant practical difficulties, including, in the latter case, who should determine what constitutes a “public interest element” and on what criteria.

A view has been expressed that there may be merit in opening up FAI’s to all Scots wherever death occurred. It is understood that the policy of both Holyrood and Westminster is that in appropriate cases the Lord Advocate should be requested to hold an FAI into the death of a serviceman or woman abroad. It is understood that the main purpose of this policy is to avoid members of the deceased’s family having to travel south to attend coroners’ inquests.

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

Yes.

In appropriate cases, common sense dictates that if the same, strong thread runs through several deaths in different jurisdictions, more information is likely to be gained from one Inquiry examining all deaths as opposed to several separate Inquiries. In addition, there would be the potential for cost saving.

It would however be essential that it be clear who is exercising ultimate control and it is suggested that it would be appropriate for the Procurator Fiscal’s Office in the chosen jurisdiction to have control and responsibility for co-ordination.

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

Yes, certain deaths should be added.

It was felt that the detention definition should be extended to cover situations where someone is detained in hospital, is subject to a "mental health" detention and to cover children in care.

Separately, although the legislation provides for an FAI, in any case where there is a death in the course of employment, it was felt, rightly or wrongly, that there were fatal road traffic accidents where the deceased had been in the course of his/her employment but no FAI had been held.

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

No.

To permit an exception allows someone to exercise a discretion. It was felt that either there is a mandatory category or there is not such a category. A "halfway house" leads to uncertainty.

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

No.

The decision should be taken against a background of independence and objectivity. Allowing parties to make representations opens the door to allegations that the Lord Advocate's decision to hold or not to hold an FAI was unduly influenced by representations from an interested party.

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

No.

This suggestion is superficially attractive but would, in our view, potentially lead to frequent allegations that the Lord Advocate was in error and basing the "reasons" on inaccurate information or a misinterpretation of the "facts".

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

No.

There is a lack of co-operation in fixing FAI dates.

Once the formal Notice is issued, there can be problems in obtaining documents to be used by the Crown against a background where only the minimum twenty-eight day notice has been given.

We feel that in all FAIs, a Preliminary Hearing should be fixed. This would allow the Court to allocate a new date for an FAI if the original intimated date required to be altered, for example, if it had become apparent that the volume of investigations to be made by interested parties was inevitably going to take longer than the four week (or less) period or if it was clear from the number of interested parties involved that the original day or days allocated was or were clearly insufficient.

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

Yes.

This view is expressed on the basis of our experience of Procurator Fiscal contact with the family of the deceased.

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

Yes.

It is nevertheless worth noting that relatives do not necessarily have an interest which is identical to that of the Crown.

13. Should provision for Preliminary Hearings be made in respect of the whole of Scotland?

Yes.

A Preliminary Hearing can greatly assist in focusing various issues, evidential or otherwise. If it is anticipated that the Preliminary Hearing will be straightforward and non-controversial then expense can be minimised by the instruction of a local Solicitor if the principal Solicitor is based elsewhere.

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

Yes.

The provision of such material should encourage the possibility of a significant amount of evidence being agreed by Joint Minute. The evidential material should be lodged/produced as early as possible. Such production should not result in any restriction on the rights of parties to seek to lead additional evidence or witnesses.

15. Should there be relaxation of the conditions under which signed and sworn Statements can be used?

No.

We consider that proper inquiry can only be effective with oral evidence and the opportunity for cross-examination.

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

While it is appreciated that there are significant cost implications in instructing an appropriate expert, cost ought to be less of a factor than it appears to us to be at present.

17. Is there a place for expert assessors in FAIs?

Yes.

If yes, should more use be made of them?

No.

If an authoritative, independent expert is led in evidence, there is no need to extend the current role.

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

No.

A witness has an obligation to tell the truth. In judicial proceedings, such as an FAI, witnesses should be responsible and accountable for what they say in evidence.

If a witness knew that his/her evidence was inadmissible elsewhere, there might be a temptation simply to say what suited the witness for the purposes of the FAI, knowing that they couldn't be challenged on their FAI version of events in other proceedings.

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

Yes.

We consider that guidance is appropriate, but only guidance. There should be no alteration to the terms of reference in Section 6(1).

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

Yes.

There would appear to be no need for a separate database. All FAI determinations ought to be placed onto the current Court website, ideally with search facilities.

In any event, this would seem to be a much less expensive option than creating a separate database.

21. Should responses to communications be monitored?

Yes.

In an ideal world, yes. There is however no point in monitoring recommendations unless someone is obliged to do something with that recommendation.

It might be appropriate if it were for the Crown Office to refer recommendations to the relevant Government departments.

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

No.

All things being equal, there are merits in re-opening an FAI. The practical considerations however weigh against re-opening. There is an obvious problem with time scales, what if additional evidence comes to light, say, three years later, how does the additional evidence impact on the evidence already led? Would an FAI effectively need to start from the beginning because of the potential effect of the apparent new evidence on the evidence already led?