

**RESPONSE BY THE JUDGES OF THE SUPREME COURTS TO THE
CONSULTATION PAPER ANENT LORD CULLEN'S REVIEW OF
FATAL ACCIDENT INQUIRY LEGISLATION**

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

No. As is pointed out in the consultation paper, an FAI as presently envisaged has certain essential features. It is public, local and inquisitorial. It is presided over by a judge and evidence is led by the procurator fiscal acting in the public interest. In most cases there are recognized participants and the determination is in the public domain. There is no compelling case for departing from these essential features and one would not wish the process to become any more adversarial than is sometimes the case.

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

No. The Sheriff Court has the advantage that it dispenses justice locally and is the ideal venue where the circumstances of the death to be investigated have caused some local concern such as the siting of a school or level crossing or the practices of a local employer. Sheriffs deal frequently with cases involving medical or technical complexity and the formality of the proceedings is, we think, an aid rather than a hindrance to ascertaining the truth. We are not convinced that there is any good reason to set up any new tribunal for FAIs given the manner in which Sheriffs have been dealing with FAIs for over a century. Such concerns as there are do not appear to us to relate to the forum but rather to the decision as to whether or not to hold an FAI and to issues of timetabling. If FAIs were to be transferred to the Court of Session we would envisage even greater difficulty in fitting them into the programme, not to mention the resource implications and the inconvenience of witnesses. If the Sheriff Court and the Court of Session both had jurisdiction it might lead to perceptions of a two-tier system and consequent dissatisfaction. On the other hand, where there has been a major disaster the practice, which has occasionally been adopted, of holding an inquiry presided over by a Court of Session Judge, seems to us to work well. However, we recognise that such inquiries are normally set up by the UK Government. It is possible to envisage a situation involving multiple deaths where the UK Government was unwilling to act yet the Lord Advocate wished to proceed with an inquiry, which at present could

only be before a Sheriff. The Scottish Ministers could set up an inquiry under the Inquiries Act 2005 but only into “Scottish matters” (Section 28). If the circumstances of the deaths related also to reserved matters then, unless a UK Minister agreed to a Joint Inquiry, there might be problems in complying with Article 2. (See the opinions of Lord Mackay of Drumadoon in the Petitions of Black and Kennedy v the Lord Advocate and the Scottish Ministers). It is generally accepted that an FAI is Convention compliant. If no other inquiry was to be set up the Lord Advocate might nonetheless be of the view that an FAI should be held and we think that it should be competent for a Court of Session Judge to preside over an FAI if the circumstances merited it. A procedure could be devised by which the Sheriff Principal in consultation with the Lord President could make the appointment.

Should specialist procurators fiscal handle FAIs? If so, should they be part of a centralized team dedicated to FAIs?

No. In some ways it is tempting to answer this in the affirmative but we are not aware of any general disquiet at the manner in which FAIs have been conducted. Many experienced depute fiscals are perfectly adept at leading evidence and we would expect them to familiarise themselves with the case at hand. However, this seems to us to be a matter for COPFS and we would not wish to comment further on the first question. A centralised team, while superficially attractive, might cause problems in relation to availability and court programming.

Should the scope of the Act be altered so as to cover FAIs into the deaths of Scots abroad?

Yes. Although we note that it is outwith the remit of the review, we share the concerns which have been expressed as to the fact that the deaths of Scottish servicemen and women abroad cannot be the subject of FAIs in this jurisdiction. While also noting the practical and resource implications of FAIs into the deaths of all Scots abroad we think that in principle the Act should be extended to cover them. However, such FAIs should not be mandatory.

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

Yes. While such a reform would detract from the local nature of the inquiry, the practical benefits are self-evident. Provision already exists for an FAI to cover more than one death arising out of the same accident or in the same or similar circumstances. See Section 1(3)(c) of the Act.

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

Yes, both additions and removals should be made. We are not convinced of the need for an FAI into every death resulting from an accident at work, given the role of the HSE. An exception already exists where there have been criminal proceedings and the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established therein. If the circumstances are plain then it is not clear why there should be an FAI unless the Lord Advocate thinks there should be, or it is thought that the Sheriff is likely to make some recommendation which, if implemented, could go some way towards preventing a recurrence. Deaths in lawful custody are a different matter, given the role of the State. We agree that it would be desirable to expand the Act to cover detention by the police other than in a police station, police cell or other similar place, those who are remanded to the care of the local authority and those subject to a hospital order or otherwise detained under mental health legislation. The deaths of children in care should be covered.

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

Yes. Where it is clear that death was due to natural causes and that no failure contributed to it (e.g. a failure to provide appropriate medication), then it would seem to us that an FAI would not serve any useful purpose.

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

No. We do not consider that this is a matter for legislation or reform. The Lord Advocate will doubtless take on board all views communicated to him or her but

any attempt to delimit or extend the categories of those whose views should be considered might interfere with the independence of the decision making process. Other than pressure groups, it is not easy to imagine anyone whose views should be considered but who will not have made them known.

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 not to hold an FAI is one which can have devastating effects on families who feel, rightly or wrongly, that an inquiry will shed more light on the circumstances of their relative's death than a mere narrative can provide. A decision not to hold one is presumably made for a reason and, while we have no wish to compromise the independence of the Lord Advocate, a formal intimation of the reason or reasons may help to bring closure to the families concerned, if not satisfy them completely. It is suggested that this might be unduly onerous but we do not agree, given the relative infrequency with which such decisions are taken. If it is not thought appropriate to provide such reasons in every case then they should at least be given where the circumstances of a death render it an exception to a mandatory category.

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

We do not have sufficient information to comment on this question.

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

We are not in a position to comment.

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

We are reluctant to express a view on this since it is quite conceivable that the compatibility of legal aid provision for FAIs with ECHR will be the subject of litigation. Employers are likely to be better able to afford legal representation than relatives and, albeit the proceedings are not adversarial, there may well be

an issue about equality of arms. It is not self-evident why any *probabilis causa litigandi* other than the relationship to the deceased should be required before state funding can be attracted. However, where there are multiple fatalities arising out of one incident, it appears to us that it is at least arguable that separate representation for every family may not be necessary, depending on the circumstances. We note that a reclaiming motion against the decision in Lord Advocate, Petitioner 2007 SLT 849 is currently at avizandum. Depending on the result it may be appropriate to consider a statutory foundation for an award of expenses in appropriate cases.

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

Yes. Such experience as some of us have of these shows that they can perform a very useful function in ironing out problems which might otherwise cause needless delay and expense. The sorts of issues which are addressed can be seen in the Practice Notes for the Sheriffdoms of Glasgow and Strathkelvin and Lothian and Borders. See Parliament House Book D716 and D1013-1014. However, it is recognised that in many cases they will not be necessary, so provision should be made for them to be dispensed with where appropriate.

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

Yes. We consider that the fiscal should make copies of such material available to the interested parties in advance of the preliminary hearing. If it is not practical to provide copies then an opportunity should be provided for inspection. The advantage of this is that parties will be better prepared for the FAI and delays should be kept to a minimum.

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

Yes. This is a matter which can be considered at a preliminary hearing. We think that the fall-back position should be that such evidence will be admitted. The onus should be on any party objecting to show cause why it should not be admitted. Presumably if the Sheriff thought that the admission of such evidence would cause unfairness then an appropriate ruling would be made. We envisage

that most use of this would be made in connection with routine evidence or evidence from witnesses who cannot attend for one reason or another and it would obviously save time and expense.

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

The most obvious answer is that they should be appropriately remunerated. However, we have no particular expertise which enables us to answer this question.

Is there a place for expert assessors? If so, should more use be made of them?

Yes. We do not consider that the extent to which they are used can or ought to be prescribed in advance. Very much will depend on the nature of the evidence under consideration but we agree that they can be helpful. However, care has to be taken to ensure that their use does not supplant either the evidence itself or a proper consideration of it by the sheriff.

Should evidence of a witness be inadmissible in other judicial proceedings?

No. This question is predicated on the notion that some witnesses may be less than frank in their evidence for fear of the possible consequences in other proceedings. However, witnesses are put on oath and are expected to tell the truth. We do not consider that the law should accommodate people who are not prepared to tell the whole truth and somehow to make allowances for the fact that that may be the case.

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

No. The content of a determination should be governed by the evidence and submissions in the case under consideration. However, we recognise that in the absence of an appeal structure there is room for variation and what might be regarded as a lack of consistency in broadly similar cases and perhaps some assistance might be provided. The use of the word "guidance" sets alarm bells ringing, however. In particular, one wonders from where it is to come. If there

is to be any “guidance” then in our view it is important that it come only from the Judicial Studies Committee.

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

Yes. If there is to be a database it makes sense for it to be updated. If sheriffs had access to it it might help to produce consistency. Furthermore, it might be of assistance in explaining why an FAI is not to be held if a death in similar circumstances has resulted in a particular determination.

Should responses to recommendations be monitored?

Yes. While we agree that there should be no mandatory implementation of recommendations, it would help to ensure accountability if the situation was monitored.

The HSE would seem to be the obvious body to do this, although we have no strongly held views on the matter. Any report should be to the Scottish Parliament.

Should the Lord Advocate be able to apply for a further FAI or the re-opening of an FAI? If so, should this only be in limited circumstances?

Yes. It is doubtful whether this would happen in anything other than limited circumstances but one test could be whether there was new evidence of such materiality that it was likely to have resulted in a different determination or different or further recommendations. In common with other proceedings, it is important to bring a measure of finality and the absence of such a test might lead to repeated pressure from relatives or interest groups to re-open an inquiry with no prospect of a different outcome.

