

Mr Andrew Mackenzie
Secretary to the Review of
Fatal Accident Inquiry Legislation
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Our ref: RL/AK
Please quote when replying

Enquiries to: Dr Lyall

Date: 25 February 2009

Dear Mr Mackenzie

RE CONSULTATION, REVIEW OF FATAL ACCIDENT INQUIRY LEGISLATION

I attach a limited response to the above consultation prepared by the Mental Welfare Commission. I appreciate that this response is after the deadline, however we only became aware of the consultation in the last few days. It appears that we have been omitted from the list of consultees. Given that the Mental Welfare Commission has significant duties and powers conferred on it by the Mental Health (Care and Treatment)(Scotland) Act 2003, including the investigation of the care and treatment of any person with a mental disorder, we have significant concerns that we were not formally consulted. The Commission has powers under Sections 11 and 12 of the Act in respect of investigations and inquiries into the care and treatment of people with a mental disorder, and under Section 12, in particular, has the power to conduct proceedings under oath.

Our response is limited to those questions which directly concern us or our functions.

Section 2 General

Q1 and 2: We think that there would be significant benefit in taking the proceedings out of the sheriff court and instituting a tribunal system. Our experience with the Mental Health Tribunals which replaced Sheriff Court hearings for compulsion under mental health legislation with the introduction of the 2003 Act has generally been positive and has resulted in a more roundly considered outcome for the individual concerned. Although they started out as adversarial they have moved to more inquisitorial in nature, and this has to some extent been due to the physical location as well as the 3 person panel.

Section 3 Deciding if an FAI should be held

Q 6 and 7; Whilst we note there has been a suggestion that the deaths of all people who are subject to compulsion under the Mental Health(Care and Treatment)(Scotland) Act 2003 should be subject to a mandatory FAI, we would be concerned about this as an automatic response. The Mental Welfare Commission is notified of all deaths of compulsory patients whether in hospital or in receipt of compulsory treatment in the community. We are also notified of all deaths of people subject to Guardianship under the Adults with Incapacity Act 2000. In many of these cases, particularly for the elderly, the death is from natural causes and a mandatory FAI would



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be unlikely to shed any further light on the circumstances. FAIs are costly and time consuming and it would, in our view, damage the perception of the process and lead to further unnecessary distress for families. We would therefore suggest that it may be appropriate for there to be consultation between the Commission and the COPFS in respect of possible FAIs in circumstances where mental health or incapacity legislation has been involved. If there are to be mandatory FAIs in these circumstances we would recommend that there should be exemptions and that consultation with the MWC may form part of the consideration.

Section 5 Evidence and Procedure

Q 16 and 17; The identification of an independent authoritative expert is clearly difficult. It would perhaps be more appropriate to obtain evidence from a number of individuals rather than relying on one, particularly in circumstances where there is disagreement about a particular action which may be of material importance to the outcome of the inquiry. The role of independent expert assessors would be helpful, particularly in complicated medical cases. If a tribunal system is implemented which has the requisite input from members with appropriate knowledge and expertise this may reduce the need for independent assessors.

Section 6 Determinations

Q19; We think it should be clear what matters will be covered by the FAI from the outset.

Q20; We believe it would be helpful for there to be a public database of determinations. It should also be agreed who should receive copies of the determinations, in addition to those parties involved, and whose responsibility it is to ensure that this happens.

Q21; We think that it is important for recommendations to be followed up. In cases where there have been recommendations relating to the care of people with a mental disorder, the Commission would be one of the appropriate bodies who could comment on the compliance with relevant recommendations.

I hope that you will find these comments useful. The Commission would be pleased to comment, if requested, on any further specific consultations.

Yours sincerely



DR R M LYALL
Chief Medical Officer