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To: Review of Fatal Accident Inquiry Legislation
Subject: Consultation Response

Review of Fatal Accident Inquiry Legislation

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Confidentiality: Yes, make my response and name available, but not my address
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Consultation Questions
Review of Fatal Accident Inquiry Legislation

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

Yes, I make the following response in the capacity of an accident investigator and expert witness working in the energy and industrial sectors and who has experience of civil and criminal trials, FAIs and Public Inquiries. In my opinion, an important aspect of an FAI should be to explore and ventilate those issues which are of wider public/safety-related interest and which, of course, flow directly from the cause and circumstances of the death(s) and any "reasonable precautions" and "defects in systems" identified. These are aspects that are often not brought out during a criminal

	<p>prosecution or at a civil trial. Valuable insight and lessons learned should be encapsulated into the Sheriff's findings and recommendations and then have a wider dissemination to the industry concerned and the public alike. There should be a positive mechanism whereby such issues are brought to the interest of those concerned. Accordingly, the purpose of the FAI should also include, where appropriate, making formal recommendations to ensure wider dissemination of matters that are of general public/industry interest. (See section 6 below)</p>
<p>Question 2: Should FAIs be held in some forum other than the sheriff court? If yes, what forum would you suggest?</p>	<p>No, ,</p>
<p>Question 3: Should specialist procurators fiscal handle FAIs? If you answered yes, above, should they be part of a centralised team dedicated to FAIs?</p>	<p>Yes, For straightforward FAIs, specialised PF's are probably not required. However, PF's should receive the required training and have access to appropriate guidance. Where the case is technically complex, the PF should organise the initial scene setting witnesses to provide the Sheriff, parties and the public with the required background and insight to understand the technical evidence. In my opinion this is not always done. For highly technical complex FAIs an experienced PF will be required and it is likely that a suitable technical advisor and/or expert(s) should be retained to support the PF team. , Yes, I cannot comment whether the work load is sufficient to warrant a centralised team for handling all FAI's but there appear to be benefits of having a small dedicated team to advise on issues relating to FAIs, provide training to PF staff and to run the more complex FAIs.</p>
<p>Question 4: Should the scope of the Act be altered so as to cover FAIs into the death of a Scot abroad?</p>	<p>I have no specific view on this matter, except to note that investigating deaths abroad and securing evidence and witnesses can be extremely difficult.</p>
<p>Question 5: Should it be possible for FAIs to be held, where appropriate, into multiple deaths in more than one jurisdiction?</p>	<p>Yes, The investigation into a multiple fatality accident should be holistic in approach, examining the cause and circumstances, which includes identifying the immediate cause(s) and the root, underlying causes. This often involves many parties and regulatory agencies working at a national and even international level. It seems incongruous and wasteful of resources that the fruits of such investigation should not be considered in a single FAI albeit one that covers more than one jurisdiction.</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>No specific view held.</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, It seems sensible to have exceptions where, for example:- (a) the deaths involved clearly no particular wider public or industry/workplace issue and (b) the deceased relatives express no strong desire for an FAI, after having the facts surrounding the death explained fully to them. However, in such circumstances where an exception is made the reasons for the decision should be recorded and be transparent.</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>,</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, In my opinion it is important for the decision to be transparent. At a minimum, it is a matter of being fair and courteous at a time of great personal loss.</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, My wider concern involves the delay in holding an FAI until a criminal prosecution is concluded. Inevitably, this means that findings and lessons learnt for an industry can be delayed for a considerable period during which repeat mistakes and accidents can occur. Also the delay can cause a serious loss and/or degrading of the quality of witness evidence. However, the delay does permit more time for an investigation and allows the PF to call upon the investigation undertaken as part of the criminal prosecution. I appreciate it is often a fine balance, but in some cases, such as the complexity or novel nature of the death and surrounding circumstances, holding an FAI quickly and before a criminal trial proceeds could be most important. In my opinion, that flexibility should be secured in any change in the legislation relating to holding an FAI.</p>
<p>Question 11: Is adequate advice, information and support provided to the relatives of the deceased? If no, what improvements could be made?</p>	<p>It should be.</p>
<p>Question 12: Is the current approach to the provision of legal aid to relatives appropriate?</p>	

<p><i>Question 13: Should provision for preliminary hearings be made in respect of the whole of Scotland?</i></p>	<p>Yes, It is sensible for there to be a provision to hold preliminary hearings for a forthcoming FAI which is at the discretion of the PF/Sheriff. Generally, I have found preliminary hearings help to focus the minds of those instructing me and encourage a greater degree of pre-planning which is helpful when having to consider complex technical issues.</p>
<p><i>Question 14: Should evidential material be provided to parties in advance of the FAI?</i></p>	<p>Yes, Advanced provision of evidential material is essential for technical cases. It avoids unnecessary delays and allows for the material and the reasonableness of the opinions derived from that material to be tested thoroughly. It is a question of fairness for all parties.</p>
<p><i>Question 15: Should there be relaxation of the conditions under which signed and sworn statements can be used?</i></p>	<p>Yes, Parties should be able to agree those witnesses which are non-contentious and for which sworn signed statements are acceptable. However, where the evidence of a witness is contentious then wherever possible, the evidence should be oral and subject to cross examination.</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>I have advised COPFS informally on possible experts in areas outside my own expertise. However, a database of independent authoritative experts should be held by COPFS covering the key disciplines and issues that have occurred or that might arise. This should be supplemented by the list of experts held by the Law Society of Scotland and other such credited expert witness lists. With respect to remuneration, clearly this must be fair for both parties. Retaining an unsuitable or less authoritative expert, in an attempt to minimise costs, is a false economy. It can lengthen proceedings and create an unnecessary cost burden on other parties involved who must seek to refute an unsound report and oral evidence.</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, No, My answer in 'No' but with a caveat of "not necessarily"! In my opinion, an expert assessor is required only for the more complex cases where the Sheriff requires frequent guidance as to what technical evidence is important and an explanation as to how the relative technical merits of the evidence may be assessed. The expert assessor should never provide "evidence" privately. If the PF presents a technical case with clarity, with the required scene setting and authoritative experts, then the need for an expert assessor is reduced.</p>

<p>Question 18: Should the evidence of a witness at an FAI be inadmissible in other judicial proceedings?</p>	<p>Yes, My response is "yes", if it enables an FAI to be conducted more promptly and the wider issues and lessons learned disseminated more quickly. (See my response to Q10.)</p>
<p>Question 19: Should there be guidance as to matters which should be covered by determinations?</p>	<p>Yes, In my opinion, the lack of recommendations and the lack of dissemination of the findings mean that important lessons for industry and safety in the work place can be lost. It appears there is a need for guidance as to the matters that should be covered by a determination. Consistency is important, without providing any straightjacket. Also, if there is to be follow-up of the recommendations (see below) then guidance is required to help the Sheriff with the content and format/style of such recommendations in order to achieve a broad consistency and facilitate easier follow-up.</p>
<p>Question 20: Would it be helpful to create an up to date public database of determinations?</p>	<p>Yes, This should prevent valuable insight and lessons from being lost. It provides for greater transparency and a wider dissemination of the findings.</p>
<p>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?</p>	<p>Yes, Recommendations that arise in any field of operation or industry are meaningless unless there is a system that allows for their review, monitoring and follow-up. This is a matter of good practice. Accordingly, if there is not already, there should be an effective system to record, review and follow-up recommendations. It is important for the Sheriff to assign an appropriate body or party to which the recommendation is directed, for example, the HSE, industry association/body, Government Department etc. This will help the review and the follow-up process. In my opinion, implementation of all recommendations made by the Sheriff should not be mandatory but rather they should be reviewed and where they are not accepted then a full explanation should be recorded. , Yes, The system for monitoring and recording recommendations should be done centrally. This will encourage both consistency and cross-referencing of recommendations which are similar in nature or subject matter. Whoever is assigned this task requires a defined remit, clear responsibilities and accountabilities and be subject to periodic audit.,</p>
<p>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</p>	<p>,</p>

in limited circumstances?

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