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Mr Andrew P Mackenzie
Secretary to the Review of Fatal Accident
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Your Ref
Our Ref IC/JL/JB

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Dear Mr Mackenzie

Consultation: Review of Fatal Accident Inquiry (FAI) Legislation

Thank you for giving NHS National Services Scotland the opportunity to respond to this consultation. Our comments are shown below:

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

A. Yes. FAIs in the Sheriff Court should be confined to cases where death arose in the course of employment or in a public/private place and should not involve considerations such as the standard of clinical treatment provided to patients within a hospital/clinical/surgery or other Health Service premises. Such matters could more appropriately be dealt with by pursuing a civil claim/action. Much of the clinical treatment case evidence is complex and the outcome of the case turns on the testimony of experts after what can be a lengthy elucidation of the facts following quite extensive pleadings, the purpose of which is to provide adequate and fair notice of the issues and focus on what is in dispute between the parties.

By their very nature, FAIs do not lend themselves to such a fair and refined way of dealing with such issues. They are designed to reach a concluded view or determination based on factual evidence of a robust nature rather than detailed scrutiny. In addition to such civil claims/actions, relatives have recourse to complaints procedures which could lead to disciplinary action, and referral to professional bodies such as the General Medical Council (GMC), the General Dental Council, the General Ophthalmic Council and the Nursing & Midwifery Council. Their interests would not be prejudiced by confiding FAIs as above. In the event of there being a series of deaths which on the surface appear to be related, a Public Inquiry could be held.

Q.2.i Should FAIs be held in some forum other than the sheriff court? If yes, what forum would you suggest?

A. Yes. A Tribunal of an inquisitorial nature could be set up as the purpose of an Inquiry should be to learn lessons and ascertain causes and not to attribute blame.

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Chairman Bill Matthews
Chief Executive Ian Crichton

Q.2.ii Why have you suggested this forum?

A. It is considered that this would be a more satisfactory and cost effective avenue of investigation into the cause of death in clinical cases. All Health Authorities where deaths have occurred, are very keen to ensure that any deficiency is rectified as soon as possible and that mechanisms are put in place for so doing before any Determination (which can be years later) is issued by a Sheriff.

Q.3 Should specialist procurators fiscal handle FAIs?

A. Yes. If FAIs are to remain in the Sheriff Court. The use of Specialist Units in Edinburgh and Glasgow has been a success given that they liaise closely with relatives.

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

A. If the system in England allows for deaths of English persons abroad to be the subject of Inquiries in England, then the same should apply to Scots who die abroad.

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

A. No. It would be preferable to hold a Public Inquiry of some kind rather than an FAI. Decision shall be one for Lord Advocate/Crown Office/Procurator Fiscal and not for relatives given the other avenues available to relatives.

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

A. No, no change should be made to the mandatory category.

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

A. It is considered that the Lord Advocate/Crown Office/Procurator Fiscal should have discretion to determine whether or not to hold an Inquiry.

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

A. No

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

A. No. The reason can be explained on an informal basis rather than formal reasoned basis. The discretion of the Lord Advocate/Crown Office/Procurator Fiscal should not be fettered/inhibited in any way given the other avenues of recourse open to relatives in clinical cases/civil action, complaints, disciplinary action, GMC, etc. plus the possibility of criminal action being taken.

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

A. No. At present if the system remains the same then a longer period of notice is required before the commencement of any FAI. At least three months notice should be given.

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- Q.11 Is adequate advice, information and support provided to the relatives of the deceased?**
- A. No. Purpose of an FAI should be explained. Not a “witchhunt”, not award damages, not a blame finding exercise but a fact finding/causes/lessons learned exercise.
- Q.12 Is the current approach to the provision of legal aid to relatives appropriate?**
- A. Yes. Case could be made out for no legal aid for relatives at FAI on the basis that under the current system the Procurator Fiscal is acting in the public interest in presenting evidence. Legal aid could be made available for pursuing a civil claim/court action.
- Q.13 Should provision for preliminary hearings be made in respect of the whole of Scotland?**
- A. Yes. Useful means under current system of anticipating problems of time constraints and witness availability.
- Q.14 Should evidential material be provided to parties in advance of the FAI?**
- A. Yes, assists in relation to fair notice concerns.
- Q.15 Should there be relaxation of the conditions under which signed and sworn statements can be used?**
- A. Yes. Make use of Affidavit evidence for uncontentious matters, and matters of a formal nature could be encouraged.
- Q.16 What can be done to ensure that the most authoritative independent experts are selected to give evidence at FAIs.**
- A. Liaison with appropriate professional bodies which would put forward a list of suitably qualified persons capable of and willing to provide expert evidence.
- Q.17 Is there a place for expert assessors in FAIs.**
- A. Yes. More use should be made of them if the present system is to be retained without major change.
- Q.18 Should the evidence of a witness at an FAI be inadmissible in other judicial proceedings?**
- A. Yes. This is a finely balanced argument. Whilst all questions should be answered honestly and to the best of an individual’s recollection, on balance perhaps there is a benefit to be gained from the evidence of a witness at an FAI being inadmissible in other judicial proceedings. This would be on the basis that a witness may be likely to give a fuller answer to a question rather than a more guarded response.
- Q.19 Should there be guidance as to matters which should be covered by determinations?**
- A. Yes. Preferable that Determination states what the findings have been on the evidence and state that evidence has been limited (if that is accurate). This would reduce the risk of possible misinterpretation by the media.
- Q.20 Would it be helpful to create an up to date public database of determinations?**
- A. No. This is not required, Determinations are currently accessible.

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Q.21 Should responses to recommendations be monitored?

A. Yes. This probably would be appropriate, and should be done centrally by the Health & Safety Executive. The report should be made to the Health & Safety Commission.

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

A. Yes, in circumstances where the interests of justice and fairness dictate that this would be appropriate.

If you would like clarification on any the comments made, please contact our Legal Adviser, Mr Ranald MacDonald, on 0131 275 7862.

Yours sincerely

IAN CRICHTON
Chief Executive

